Supreme Court, U.S.
FILED

No. 04-1507 MAY 9 - 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

JUDITH MILLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the First Amendment provide any protection for journalists subpoenaed to reveal the identity of confidential sources in federal criminal proceedings?

2. Should a federal common law privilege be recognized under Federal Rule of Evidence 501 to provide any protection for journalists who are subpoenaed in federal criminal proceedings to reveal the identity of their confidential sources?

3. Is it consistent with the Fifth Amendment for a journalist to be adjudicated in contempt and ordered imprisoned for up to eighteen months on the basis of evidence submitted *ex parte* to the district court which the journalist and her counsel were denied the opportunity to see or rebut?

PARTIES TO THE PROCEEDING

The parties to the proceeding in *In re Grand Jury Subpoena, Judith Miller* (D.C. Cir. Case No. 04-3138) were Judith Miller and the United States of America. By order of the court of appeals, that proceeding was consolidated for briefing and argument with *In re Grand Jury Subpoena, Matthew Cooper* (D.C. Cir. Case No. 04-3139) and *In re Grand Jury Subpoena, Time Inc.* (D.C. Cir. Case No. 04-3140). The parties to those proceedings were Matthew Cooper, Time Inc. and the United States.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the court of appeals is reported at 397 F.3d 964 and is reprinted in the Appendix hereto at 1a-77a. The district court's opinion denying petitioner's motion to quash the Special Counsel's subpoenas is reported at 338 F. Supp. 2d 16 and is reprinted, along with the district court's unreported order denying that motion, in the Appendix at 80a-86a. The district court's order finding petitioner in civil contempt of court is unreported and is reprinted in the Appendix at 78a-79a.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. Petitioner's timely petition for rehearing *en banc* was denied on April 19, 2005. *See* App. 98a-103a.[1] This petition is timely filed within 90 days of that decision. Jurisdiction is invoked under 28 U.S.C. § 1254(1) (2000).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First and Fifth Amendments to the United States Constitution are reproduced in the Appendix to this petition at 104a. Pertinent provisions of 18 U.S.C. § 1826 (2000), Fed. R. Evid. 501 and Fed. R. Crim. Proc. 17 are reproduced in the Appendix at 105a-107a.

STATEMENT OF THE CASE

On July 6, 2003, *The New York Times* published a controversial op-ed piece written by former Ambassador Joseph Wilson that was critical of the Bush administration's claim, prior to the commencement of hostilities in Iraq, that Iraq had sought to obtain uranium, a key ingredient in the development of nuclear weaponry, from Niger. App. 183a-187a. The claim, which had been featured in the President's State of the Union Address in

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[1] References to "App." are to the appendix to this petition.

January 2003, had prompted intense public scrutiny and debate. Ambassador Wilson asserted in his op-ed piece that he had been sent to Niger in 2002 by the CIA to investigate whether it was true that Iraq had been seeking to purchase uranium from Niger. According to Ambassador Wilson, he investigated the claim and reported on his return that there was no credible evidence that any such efforts had been made. *Id.* Ambassador Wilson asserted "that some of the intelligence related to Iraq's nuclear weapons program was twisted [by the Administration] to exaggerate the Iraqi threat." App. 183a.

Eight days later, an article authored by journalist Robert Novak was published in the *Chicago Sun Times*. App. 188a-190a. Novak asserted that "the CIA's decision" to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge." App. 188a. In fact, Novak maintained, the decision to send Wilson to Niger had been prompted by his wife:

> Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger to investigate [the report]. The CIA says its counter-proliferation officials selected Wilson and asked his wife to contact him.

App. 189a.

In the weeks following the publication of Novak's piece, a number of other stories appeared in the press concerning Wilson's claims, the Administration's response to them and the asserted role of Wilson's wife, Valerie Plame, in the CIA's decision to send her husband to Niger. A-26.[2] In the face of mounting criticism of the Novak article and those in the Administration who had provided information about Ms. Plame's CIA associations to Mr. Novak, in the fall of 2003, the Department of Justice began an investigation to determine the identity of those responsible for disclosing Ms. Plame's identity. After the

[2] References to "A-" are to the appendix of record materials filed with the court of appeals.

Department of Justice looked into the matter for several months, Attorney General Ashcroft recused himself. App. 191a. The same day, Deputy Attorney General James Comey announced the appointment of Patrick Fitzgerald, the United States Attorney for the Northern District of Illinois, as Special Counsel. App. 192a. In doing so, Mr. Comey asserted that, as acting Attorney General, he had delegated all of the powers of the Attorney General to Mr. Fitzgerald. *Id.*

Proceedings Before the District Court

On August 12 and 14, 2004, the Special Counsel issued subpoenas to Judith Miller seeking documents and testimony in connection with the Plame investigation. App. 115a-119a.

Ms. Miller is a correspondent at *The New York Times*. She writes about national security issues, with special emphasis on terrorism, the Middle East and weapons of mass destruction. App. 108a. Ms. Miller has served as *The Times*'s Cairo bureau chief, deputy Washington bureau chief, news editor, Paris correspondent, special correspondent to the Persian Gulf crisis and Sunday Magazine special correspondent. App. 109a. She has written four books, including books on Saddam Hussein and the spread of Islamic extremism. *Id.* Ms. Miller shared a Pulitzer Prize for a January 2001 series on Osama bin Laden and Al Qaeda published in *The Times*. *Id.*

Unlike most other reporters who have been subpoenaed in connection with the Special Counsel's investigation, Ms. Miller never wrote an article about Ms. Plame or Ambassador Wilson. *Id.* Ms. Miller did, however, contemplate writing one or more articles about Ambassador Wilson and related matters and, in preparation for those potential articles, spoke in strictest confidence with one or more sources whose identity Ms. Miller agreed to keep secret. *Id.*

Concluding that she could not comply with the Special Counsel's subpoenas without revealing information that would disclose the identity of her confidential sources, Ms. Miller moved to quash the subpoenas on the grounds that the information

sought was, *inter alia*, protected by the reporter's privilege recognized under the First Amendment and federal common law.[3] In support of her motion, she submitted extensive evidence demonstrating that she would not be able to function as a journalist without the use of confidential sources and that, if forced to comply with the subpoenas, her ability, and that of other journalists, to investigate and report news would be irreparably impaired. App. 108a-114a; 165a-178a; 207a-225a. Ms. Miller also testified about the importance of confidential sources in informing the public about matters of national concern:

> Over the years, I have written or contributed to innumerable articles that have been based on information received from confidential sources at the highest levels of our government. Among them, for example, is a series of articles published in The Times during January 2001 about the threat posed by international terrorists, including Osama bin Laden and Al Qaeda, for which I shared a Pulitzer Prize. The Al Qaeda series revealed a great deal of information about a serious and looming threat which, at the time, had gone largely unnoticed by many in the American public and other mainstream media. . . .
>
> I also relied to a considerable degree on confidential information provided by senior government officials for my book, *Germs*, which was published in early September 2001. The book, which I co-wrote with two other investigative journalists, discusses the real and serious threat presented by germ warfare and provides an inside look into how germ warfare had been waged. I believe that *Germs* not only raised the public's awareness surrounding the threat of germ warfare, but also brought to public light startling revelations about the actions of the United States and foreign governments in the production, testing and handling of germ-based weapons.

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[3] The district court had jurisdiction over the matter pursuant to 18 U.S.C. § 3231.

> Without the benefit of information from confidential sources who spoke to me without fear of their identities being revealed, neither the Al Qaeda series, *Germs*, nor, for that matter the vast majority of stories I have written for *The Times*, could have ever been published.

App. 110a-111a. Ms. Miller's testimony, and similar testimony from a number of other journalists, was, to our knowledge, wholly unrebutted by the Special Counsel.

In response to Ms. Miller's motion to quash, the Special Counsel submitted extensive *ex parte* affidavits in support of his position that any privilege claimed by Ms. Miller was overcome in this case. A-458; A-459. Neither Ms. Miller nor her counsel was ever permitted to examine or rebut those submissions and objected to their being considered by the district court on due process grounds.

On September 9, 2004 the district court denied the motion to quash, grounding its ruling on its reading of this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). The court concluded that journalists subpoenaed by a grand jury have no protection against compelled disclosure either under the First Amendment or federal common law. App. 85a; 97a. Relying on the *ex parte* affidavits, the district court held that even if there were First Amendment or common law protections, those protections against compelled disclosure had been overcome. App. 82a-83a; 96a.

Shortly after the motions to quash were denied, Ms. Miller advised the district court, through her counsel, that she could not comply with the subpoenas consistent with her professional and ethical obligations to her confidential sources, stressing that she meant no disrespect to the court. The Special Counsel promptly moved for an order holding Ms. Miller in civil contempt. The district court granted the motions, ordering Ms. Miller "confined at a suitable place until such time as she is willing to comply with the grand jury subpoenas" for the lesser of the life of the term of the grand jury (including extensions) or eighteen months. The district court simultaneously noted that Ms. Miller

had indicated her intention promptly to pursue an appeal and specifically found that her appeal was "brought in good faith and raises substantial issues of law." App. 78a. Ms. Miller was released on bail pending resolution of her appeal and promptly appealed to the court of appeals. Her appeal was ultimately consolidated with the appeals of Matthew Cooper and Time Inc. from similar orders entered by the district court. App. 6a.

The Decision of the Court of Appeals

On February 15, 2005, the court of appeals issued its decision affirming the district court. Its lengthy ruling, comprised of four separate opinions, reflected substantial disagreement on several critical points. Judge Sentelle authored the opinion for the Court joined by Judge Henderson except as to part II(B)—the discussion of the federal common law privilege. *See* App. 38a. Judge Tatel concurred in the judgment alone. Each of the panel members also issued a separate opinion.

All three members of the panel found no First Amendment protections for appellants, but their reasoning varied. Judges Sentelle and Henderson expressed the view that the First Amendment issue was foreclosed by this Court's decision in *Branzburg*. Judge Tatel, in contrast, acknowledged that many courts of appeals had construed *Branzburg* in the manner urged by appellants, but concluded that prior D.C. Circuit precedent, although inconsistent, and *Branzburg* foreclosed him from concluding that any First Amendment privilege existed. App. 41a-42a.

On the issue of federal common law, the panel members were of three different minds. Judge Sentelle concluded that the recognition of a privilege under federal common law was foreclosed by *Branzburg*. App. 24a. Judge Tatel would have recognized a privilege under Rule 501 based upon his application of this Court's ruling in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996). App. 44a. Judge Henderson declined to reach the federal common law issue, concluding that the Special Counsel had offered sufficient evidence to overcome any hurdle that a privilege could present. Her opinion noted that "both the *Branzburg* majority opinion as well as Justice Powell's separate concur-

rence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government." App. 34a.

Eight pages were redacted from Judge Tatel's opinion. App. 66a-74a. The redacted passages, which were based on the *ex parte* submissions provided to the district court by the Special Counsel, apparently set forth the facts that led the court to conclude that the Special Counsel had overcome any privilege that might exist. App. 15a. The court also concluded that petitioner's rights under the Due Process Clause were not implicated by the fact that neither she nor her counsel had been permitted to see the omitted material upon which the court relied. App. 16a.

REASONS FOR GRANTING THE WRIT

Every day in newsrooms across this country, reporters gather information of enormous import to the public from sources who only agree to disclose that information on the condition that the reporters agree to maintain the confidentiality of their identities. As the record in this case reveals, this is particularly so in our Nation's capital. In the post-9/11 era, it has become the norm—indeed a regularly required practice—at the White House, the Department of Defense, the Department of Homeland Security and elsewhere for government officials to require promises of confidentiality before information will be made available to the press and therefore the public. App. 215a.

As this case reflects, journalists feel passionately about protecting the identity of their confidential sources, even when doing so places their own liberty at peril.[4] They do so both because they believe they should keep their word and because

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[4] In a survey of 711 journalists conducted by the First Amendment Center in cooperation with Investigative Reporters and Editors and the Radio and Television News Directors Association, over 86 percent of the respondents agreed that "the use of confidential sources [was] essential to [their] ability to report some news stories to the public." *See Reporters and Confidential News Sources Survey—2004*, at http://www.firstamendmentcenter.org/news.aspx? item=reporters_confidential_survey_04 (last visited May 4, 2005).

they know that if they do not, their sources will dry up and they will be unable to offer timely information to the public about important issues of our day. There is nothing new in this. From the pre-revolutionary days of British colonial rule when John Peter Zenger refused to reveal his sources while he was jailed for criticizing the British governor of New York and young Benjamin Franklin declined to identify the sources of his brother's Philadelphia newspaper through today, journalists have steadfastly protected the confidentiality of their sources.[5] Indeed, the ethics codes of every major national organization of journalists in this country insist that journalists do so. *See, e.g.*, American Society of Newspaper Editors Statement of Principles, Art. VI ("Pledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly."), *at* http://www.asne.org/index.cfm?ID=888 (last visited May 6, 2005); Radio-Television News Directors Ass'n Code of Ethics and Professional Conduct ("Journalists should keep all commitments to protect a confidential source."), *at* http://www.rtnda.org/ethics/coe.shtml (last visited May 6, 2005); Society of Professional Journalists Code of Ethics ("Keep promises."), *at* http://www.spj.*org*./ethics_code.asp (last visited May 6, 2005).[6]

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[5] *See* Gene Wiggins, *The Case of John Peter Zenger (1735)*, *in* THE PRESS ON TRIAL: CRIMES AND TRIALS AS MEDIA EVENTS, at 8 (Lloyd Chiasson, Jr. ed. 1997); THE AUTOBIOGRAPHY OF BENJAMIN FRANKLIN, at 69 (Leonard W. Larabee, et al., eds., 1964).

[6] The duty of journalists to protect the confidentiality of sources is recognized by professional press societies throughout the world. *See e.g.*, International Federation of Journalists, *Declaration of Principles on the Conduct of Journalists*, Art. 6 (adopted Apr. 25-28, 1954 and amended June 2-6, 1986), *at* http:/www.uta.fi/ethicnet/ifj.html (last visited May 5, 2005) ("The journalist shall observe professional secrecy regarding the source of information obtained in confidence."); United Kingdom Press Complaints Commission, *Code of Practice*, Art. 14 (ratified Apr. 28, 2004 and in effect from June 1, 2004), *at* http://www.pcc.org.uk/cop/cop.asp (last visited May 5, 2005) ("Journalists have a moral obligation to protect confidential sources of information."); Association of Journalists of the Republic of Poland, *Code of Ethics*, Art. II (adopted Sept. 1991), *at* http://www.uta.fi/ethicnet/poland.html (last visited May

The situation faced by Ms. Miller is not unique and is likely to recur. In the last 15 months, it has been reported that more than 70 journalists and news organizations have been embroiled in disputes with federal prosecutors and other litigants seeking to discover unpublished information; dozens have been asked to reveal their confidential sources; at least nine of those currently face the prospect of imminent imprisonment or substantial punitive fines.[7] Yet even as the number of reporters subpoenaed to reveal the identity of their confidential sources has continued to soar, the law governing the relationship between reporters and their sources has become ever less clear.

This Court has not considered the issue of whether journalists have any right not to reveal the identity of confidential sources since its decision in *Branzburg*, decided more than 30 years ago. That decision has been described by both courts and commentators as "confusing,"[8] "enigmatic,"[9] and filled with

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5, 2005) ("A journalist is obliged to keep and to preserve the professional secret if the informant reserves his/her anonymity."); Swiss Federation of Journalists, *Declaration of Duties and Rights of Journalists*, § 6 (adopted June 17, 1972 and partially revised Sept. 16, 1994), *at* http://www.uta.fi/ethicnet/switz. html (last visited May 5, 2005) ("[Journalists must] keep the professional secrecy and do not reveal the sources of confidential information.'); Hong Kong Journalists' Ass'n, Code of Ethics, § 7, *at* http:// www.uow.edu.au/ crearts/journalism/AJNET/ethics.html (last visited May 5, 2005) ("A journalist shall protect confidential sources of information.").

[7] *See, e.g.*, Rachel Smolkin, *Under Fire*, 27 AM. JOURNALISM REV., 18 (Feb. 1, 2005); Reporters Committee for Freedom of the Press, *Special Report: Reporters and Federal Subpoenas*, *at* http://www.rcfp.org/shields_ and_subpoenas.html (current as of Apr. 19, 2005).

[8] *See* Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227, 231 (1999) ("*Branzburg* is a confusing 4-1-4 decision.").

[9] *Branzburg*, 408 U.S. at 725 (Stewart, J., dissenting) (characterizing Justice Powell's concurring opinion as "enigmatic"); ROBERT D. SACK, SACK ON DEFAMATION, § 14.3.2 at 14-13 - 14-14 (3d ed. 2004) (describing Justice White's opinion as "rather enigmatic.").

"internal contradiction."[10] As one commentator has put it, "[t]he lower courts have struggled to interpret the conflicting principles of *Branzburg*, and the level of constitutional protection extended to newsgathering remains unsettled."[11] In an area of law where predictability is of paramount importance, the current state of the law is, to put it mildly, confused.

In the years since *Branzburg*, the courts of appeals have continued to wrestle with the issue of whether there is any constitutional or common law privilege at all, with the impact of Justice Powell's critical concurring opinion in that case and with the application of the privilege in varying contexts. A reporter gathering information for an article thus cannot be sure which circuit's law may be held to govern the question of whether (and, if so, to what extent) a promise to protect the identity of confidential sources will be legally honored; in at least four circuits, such protection is provided in criminal cases; in at least ten circuits, similar protection is provided in civil cases. Nor can journalists predict whether a subpoena will issue in connection with a state court proceeding (49 of the states now provide total or qualified protection for journalists) or a federal tribunal (which may, as the court of appeals determined here, provide no protection at all).

The cacophony, if not utter chaos, among the circuit courts is well illustrated by the simultaneous progress of distinct judicial proceedings involving Ms. Miller and the same federal prosecutor in two circuits. In this case, the Court of Appeals for the District of Columbia has determined that, when subpoenaed by a federal grand jury, journalists have no recourse to the First Amendment to protect the identity of their confidential sources. At the same time, a federal district court in New York, in another case involving Ms. Miller and Mr. Fitzgerald, has ruled precisely to the contrary relying on Second Circuit precedent and that of other circuits. *See New York Times Co.* v. *Gonzales*,

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[10] Jennifer L. Marmon, Note, *Intrusion and the Media: An Old Tort Learns New Tricks*, 34 IND. L. REV. 155, 158 (2000) ("*Branzburg* . . . set forth an internal contradiction").

[11] *Id.*

No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Feb. 24, 2005).

All this conflict arises about a journalistic practice that has had the most direct impact on the ability of our citizens to be informed. Throughout our country's history much significant reporting about serious national issues would have been impossible but for information provided by sources who insisted that their identities remain confidential.

Some of the articles based upon confidential sources have become the stuff of journalistic legend—reporting on the Pentagon Papers and the Watergate scandal, for example—but by far the greater use of such information is reflected in day-to-day reporting on the widest range of topics. In the three months after the attack on the United States on September 11, 2003, for example, Ms. Miller and a colleague wrote 78 articles published in *The New York Times* that "contained information from confidential sources on a range of issues including: (1) financing and support of Al Qaeda provided from sources in Pakistan, Saudi Arabia, and the United Arab Emirates; (2) cooperation between Al Qaeda and Pakistani intelligence prior to September 11, 2001; (3) the U.S. government's preparedness for the attacks of September 11, 2001; (4) the U.S. government's efforts to combat Al Qaeda in Afghanistan; (5) the proposed internal reorganization of the FBI; (6) the existence of weapons of mass destruction in Iraq; (7) the spread of anthrax and resulting U.S. government investigations." *Id.* at *9, n.7. If the court of appeals is correct that journalists no longer have any claim to protect such sources from federal prosecutors, the public would be deprived of information of the most profound importance.

A. Review Is Warranted To Resolve The Pervasive And Irreconcilable Conflicts Among The Lower Courts As To Whether And, If So, When The First Amendment Shields Journalists From Being Ordered To Reveal Their Confidential Sources In Federal Criminal Proceedings

The federal courts of appeals are deeply divided over the fundamental constitutional question presented by this case and

answered in the negative by the court below—*i.e.*, whether the First Amendment protects reporters called upon to reveal confidential sources in federal criminal proceedings, including before grand juries. These divisions, detailed below, have left the law in disarray, with reporters granted a patchwork of First Amendment protections that vary widely from circuit to circuit.

In *Branzburg*, the Court was presented with a case involving journalists who had been held in contempt for failure either to appear or testify before grand juries that were investigating criminal conduct that the reporters had learned about in the course of preparing stories for publication. The Court upheld the contempt convictions in a 5-4 decision making clear, at the same time, that newsgathering is not without First Amendment protection. 408 U.S. at 681 ("[W]ithout some protection for seeking out the news, freedom of the press would be eviscerated."). Justice Powell, who joined the majority with his deciding vote, wrote a separate concurring opinion that was plainly crafted to set forth the limited scope of the Court's ruling—or, at the least, the limited nature of any opinion Justice Powell was prepared to join. In so doing, Justice Powell observed that the ruling did not mean that "newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources." *Branzburg*, 408 U.S. at 709 (Powell, J., concurring). In clarifying the nature of these "constitutional rights," Justice Powell explained, in an oft-quoted passage, that:

> [I]f the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. *The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.* The balance of these vital con-

> stitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710 (emphasis added).[12]

In the decades since *Branzburg* was decided, considerable disagreement and resultant uncertainty has emerged among and within the circuit courts as to whether and to what extent the First Amendment provides any protection to reporters and their confidential sources. Four circuits recognize First Amendment protection stemming from *Branzburg* in civil and criminal cases. Three circuits recognize such protection in civil but not criminal cases. Two circuits recognize protections in civil cases but have not addressed what, if any, protections are available in the criminal context. One circuit has rejected protection in the criminal context but has not considered whether protections are available in the civil context. One circuit recognizes the privilege in civil cases and criminal trials but has refused to recognize the privilege in grand jury proceedings. Another circuit has rejected the privilege entirely.

The First, Second, Third and Eleventh circuits have recognized First Amendment protection resulting from *Branzburg* in both civil and criminal cases. These, of course, are the courts of appeals whose decisions conflict most directly and irreconcilably with the decision below. In *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981), for example, the Third Circuit held that "journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases." The court concluded that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out

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[12] In his later concurring opinion in *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 (1978), Justice Powell observed that his *Branzburg* concurrence had made clear that "[i]n considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime." *Id.* at 570 n.3 (Powell, J., concurring).

of which the request for the information arises is a criminal trial." *Id. See also In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*) (grand jury investigation); *Riley* v. *City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979) (civil case).

The First, Second and Eleventh Circuits are in accord with the Third. *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (collecting cases);[13] *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (citing *Baker* v. *F & F Investment*, 470 F.2d 778, 784 (2d Cir. 1972); *Gonzales* v. *National Broadcasting Co.*, 194 F.3d 29, 36 (2d Cir. 1999);[14] *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980)), *cert. denied*, 483 U.S. 1021 (1987).[15]

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[13] In *In re Special Proceedings*, which involved the criminal contempt conviction of Rhode Island television reporter James Taricani, the court observed that it has traditionally required " 'heightened sensitivity' to First Amendment concerns and invite[d] a 'balancing' of considerations" when reporters are subpoenaed in civil and criminal cases. 373 F.3d at 45. Demonstrating the uncertainty surrounding *Branzburg*'s application, however, the court qualified its holding by noting that its previous decisions arose "at least in situations distinct from *Branzburg*" and that it is "unsettled" whether the protections it identified were strictly constitutional requirements or simply "prudential considerations." *Id.*

[14] The Second Circuit, which has concluded that "*Branzburg* recognized the need to balance First Amendment values even where a reporter is asked to testify before a grand jury," found "no legally-principled reason" for distinguishing between civil and criminal cases when applying the privilege, *see Burke*, 700 F.2d at 77, but indicated that in criminal cases the threshold to overcome the privilege may be "lower." *See Gonzales*, 194 F.3d at 34 n.3.

[15] Courts that have agreed on the existence of a First Amendment privilege in criminal cases have not always agreed on the scope of that privilege and the proper threshold for overcoming it. *See generally* Karl H. Schmid, *Journalist's Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals' Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002) (concluding that courts of appeals have

In contrast to these four circuits, three other circuits (the Fourth, Fifth, and now, the District of Columbia Circuit) have held that *Branzburg* forecloses First Amendment protection for reporters in criminal cases, but not in civil cases. In *United States* v. *Smith*, 135 F.3d 963, 968-72 (5th Cir. 1998), the Fifth Circuit held that, at least with respect to non-confidential information, "the needs of the press are not to be weighed against the needs of the government" in criminal, as opposed to civil, proceedings. The court in *Smith* was aware of the obvious conflict its decision created with other circuits. *Id.* at 969 ("Some courts have taken from Justice Powell's concurrence a mandate to construct a broad, qualified newsreporters' privilege in criminal cases . . . we decline to do so.") (citations omitted). *Compare id. with Miller*, 621 F.2d at 726 (recognizing privilege in civil case). The Fourth Circuit took a similar position in *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992), which also involved a subpoena for non-confidential information, finding that "absent evidence of government harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution." *Compare id. with LaRouche* v. *National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.) (recognizing privilege in a civil case), *cert. denied,* 479 U.S. 818 (1986). The District of Columbia Circuit now similarly recognizes a First Amendment privilege against compelled disclosure in civil, but not criminal cases. *Compare* App. 14a *with Zerilli* v. *Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981).

The other circuits have adopted varying positions. The Eighth and Tenth Circuits have recognized a privilege in civil cases but have not directly addressed whether any First Amendment protection is available in criminal cases. *See Cervantes* v. *Time, Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973);[16] *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d

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applied varying standards for overcoming the privilege but have generally been more lenient in approving prosecutors' subpoenas than those served by defendants in criminal cases).

[16] In *Cervantes*, the Eighth Circuit distinguished *Branzburg* on the basis that it involved criminal proceedings. 464 F.2d at 992 n.9.

433, 437 (10th Cir. 1977). The Sixth Circuit, on the other hand, has rejected the privilege in a criminal case but has not yet addressed whether a privilege exists in civil cases. *See In re Grand Jury Proceedings (Storer Communications, Inc. v. Giovan)*, 810 F.2d 580, 584 (6th Cir. 1987).

The Ninth Circuit has adopted a unique position: it has upheld the privilege in civil cases and in criminal trials, but has rejected the privilege in the context of grand jury proceedings. *Compare Shoen* v. *Shoen*, 5 F.3d 1289 (9th Cir. 1993) (recognizing privilege in civil case) *with Farr* v. *Pitchess*, 522 F.2d 464 (9th Cir. 1975) (upholding privilege in criminal trial), *cert. denied*, 427 U.S. 912 (1976), *and In re Grand Jury Proceedings (Scarce* v. *United States)*, 5 F.3d 397 (rejecting privilege in grand jury context). Although the court in *In re Grand Jury Proceedings* did not articulate a legally principled distinction between criminal trials and grand jury investigations for purposes of applying the First Amendment, it appears that the First Amendment rights of journalists in the Ninth Circuit depend entirely on this distinction, which stems from the Ninth Circuit's unique reading of *Branzburg*.

The Seventh Circuit, by contrast, has concluded that *Branzburg* forecloses the recognition of First Amendment protection for reporters. In *McKevitt* v. *Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003), a civil case, the court held that *Branzburg* only requires that subpoenas directed to reporters, like all subpoenas, be "reasonable in the circumstances," as required by Fed. R. Crim. Proc. 17. Writing for the court, Judge Posner acknowledged the split in the circuit courts, observing that "[a] large number of cases" have identified a reporter's privilege based on *Branzburg* but "do not agree on its scope." *Id.* at 532.

The disagreements between the circuit courts over the reporter's privilege stem in large part from a disagreement as to the meaning and effect of Justice Powell's concurrence in *Branzburg*. Given the "enigmatic" nature of the *Branzburg* holding, this is not surprising. Perhaps Justice Stewart summarized the challenges of understanding *Branzburg* best when he stated

that, "[in *Branzburg*], the Court rejected the [reporters'] claims by a vote of five to four, or, considering Mr. Justice Powell's concurring opinion, perhaps by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631 (1975), *reprinted in* 50 HASTINGS L.J. 705, 709 (1999). The courts of appeals have strained to make sense of the opinion and have reached diverging interpretations of its meaning and precedential significance.

Four circuits (the First, Second, Third and Eleventh) have consistently held that Justice Powell's concurrence was determinative of the outcome in *Branzburg*. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) (characterizing Justice Powell's concurring opinion as "essential"); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 8 & n.9 (2d Cir.) (concluding that Justice Powell "cast the deciding vote" in *Branzburg* and that "his reservations are particularly important in understanding the decision"), *cert. denied,* 459 U.S. 909 (1982); *Riley*, 612 F.2d at 715-16 (applying Justice Powell's balancing test and observing that he "cast the deciding vote in *Branzburg*"); *Caporale*, 806 F.2d at 1504 (citing *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983) (finding a First Amendment privilege based on a "careful reading of the plurality and concurring opinions in *Branzburg*")).

By contrast, one circuit (the Sixth), has unequivocally held that Justice Powell's concurrence deserves no weight at all independent of the majority's opinion. *See In re Grand Jury Proceedings (Storer Communications, Inc.* v. *Giovan)*, 810 F.2d at 584-85 ("It is readily apparent, then, that Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands its holding[.]").

Four circuits (the Fourth, Fifth, Ninth and now the D.C. Circuit) have expressed shifting views on the effect of Justice Powell's concurrence. The decision below, for example, refused to give independent weight to Justice Powell's concurrence, *see* App. 12a-13a, thus conflicting directly with the D.C. Circuit's earlier observation that *Branzburg* was "controlled" by Justice

Powell's opinion. *See Carey* v. *Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974). Similarly, in *Farr*, 522 F.2d at 467, the Ninth Circuit relied on Justice Powell's opinion (which it said was "needed to obtain a plurality") when it balanced reporters' First Amendment interests and societal interests in a dispute arising out of the criminal trial of Charles Manson. Later, however, in finding that no privilege existed in *In re Grand Jury Proceedings (Scarce* v. *United States)*, 5 F.3d at 400, the same court found that Justice Powell's concurrence merely "underscored" the majority opinion. The Fourth and Fifth Circuits have similarly expressed internally inconsistent views regarding the meaning and effect of Justice Powell's concurrence. *Compare Selcraig*, 705 F.2d at 792 (finding a qualified privilege based on the "plurality and concurring opinions" in *Branzburg*), *with Smith*, 135 F.3d at 969 (noting "plurality" characterization in *Selcraig*, but declining to take from Justice Powell's opinion "a mandate to construct a broad, qualified newsreporter's privilege in criminal cases"); *compare LaRouche* v. *National Broadcasting Co.*, 780 F.2d at 1139 (finding a broadly applicable First Amendment privilege based on Justice Powell's concurrence), *with In re Shain*, 978 F.2d at 853 (concluding that Justice Powell's concurrence only "emphasize[ed] the Court's admonishment against official harassment of the press").

The remaining circuit court decisions interpreting *Branzburg* have either not specifically addressed the meaning and import of Justice Powell's concurrence (*i.e.*, the Eighth and Tenth Circuits),[17] or have announced they are decidedly unsure of the opinion's effect:

> Although the Supreme Court in [*Branzburg*] declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. Since the dissenting Justices would

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17 *See Cervantes*, 464 F.2d at 992 n.9; *Silkwood*, 563 F.2d 433.

> have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future") maybe his opinion should be taken to state the view of the majority of the Justices—though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.[18]

McKevitt, 339 F.3d at 531-32.

Granting certiorari would also afford the Court an opportunity to resolve the irreconcilable conflicts between the circuits that have concluded that there is no First Amendment privilege in criminal cases (or any case) and decisions of state courts of last resort, which, when the issue has been presented, have frequently recognized a reporter's privilege under the First Amendment in criminal and civil cases alike.[19] These conflicts,

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[18] Similar differences of opinion and shifting views regarding the effect of Justice Powell's concurrence have been widespread among state courts of last resort. *Compare In re Letellier*, 578 A.2d 722, 724 (Me. 1990) (noting that while Justice Powell's concurrence was "the critical fifth vote," he wrote only "to respond to concerns raised in the *Branzburg* dissents"), *with Idaho* v. *Salsbury*, 924 P.2d 208, 209-10 (Idaho 1996) (adopting Justice Powell's balancing approach and concluding that he "cast the deciding vote creating the majority for the decision"), *and Vermont* v. *St. Peter*, 315 A.2d 254, 255 (Vt. 1974) (concluding that Justice Powell's concurrence "suggests that the First Amendment supports enough of a privilege in newsgatherers to require a balancing between the ingredients of freedom of the press and the obligation of citizens, when called upon, to give relevant testimony relating to criminal conduct"), *and Kurzynski* v. *Spaeth*, 538 N.W.2d 554, 558 (Wis. Ct. App. 1995) ("[T]he majority opinion in *Branzburg* when read together with the concurring opinion of Justice Powell, whose agreement was necessary to achieve that majority, recognized a qualified journalist's privilege[.]").

[19] *Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978), *followed in Waterloo/Cedar Falls Courier* v. *Hawkeye Community College*, 646 N.W.2d 97 (Iowa 2002) (civil); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal), *cert. denied*, 440 U.S. 929

particularly as regards the proper interpretation of *Branzburg*, are stark. *See, e.g., New Hampshire* v. *Siel*, 444 A.2d 499, 502 (N.H. 1982) ("Our review of *Branzburg* . . . convinces us that a majority of the justices on the United States Supreme Court recognized that a reporter had a qualified first amendment privilege to protect confidential sources."); *In re Letellier*, 578 A.2d 722, 726 (Me. 1990) ("The First Amendment thus requires that we balance the competing societal and constitutional interests on a case-by-case basis, weighing any possible injury to the free flow of information against the recognized obligation of all citizens to give relevant evidence regarding criminal conduct."); *In re Pennington*, 581 P.2d 812, 815 (Kan. 1978) ("Courts applying *Branzburg* to criminal cases have generally concluded that the proper test for determining the existence of a reporter's privilege in a particular criminal case depends upon a balancing of the need of a defendant for a fair trial against the reporter's need for confidentiality."), *cert. denied*, 440 U.S. 929 (1979); *id.* ("While courts recognize that a news reporter's privilege is more tenuous in a criminal proceeding than in a civil case, that fact in and of itself does not automatically require disclosure in a criminal case."); *Idaho* v. *Salsbury*, 924 P.2d 208, 213 (Idaho 1996) (applying "a balancing test between the freedom of the press—the right of the public to have an unfettered press—and the right of the public to disclosure in the particular proceeding" in a criminal trial based on its reading of *Branzburg*).

The scope—indeed, the existence—of a reporter's privilege is a matter of the highest importance as to which there is ongoing and irreconcilable disagreement in the lower courts that is well worthy of plenary review by this Court.

(1979); *In re Letellier*, 578 A.2d 722 (Me. 1990) (criminal); *New Hampshire* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *West Virginia ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989), *followed and modified in West Virginia ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *Wisconsin* v. *Knops*, 183 N.W.2d 93 (Wis. 1971) (criminal), *followed in Kurzynski* v. *Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil).

B. Review Is Warranted To Resolve The Circuit Conflict As To Whether A Journalist's Privilege Should Be Recognized Under Federal Common Law And To Address The Proper Application Of This Court's Ruling In *Jaffee* v. *Redmond*

The issue of whether a reporter's privilege should be recognized under federal common law is worthy of the exercise of this Court's certiorari jurisdiction because the court of appeals' decision cannot be reconciled with this Court's ruling in *Jaffee* and because the decision below conflicts with definitive rulings of the United States Court of Appeals for the Third Circuit.

In 1975, three years after *Branzburg* was decided, Congress enacted the Federal Rules of Evidence, which, rather than enumerate a number of specific federal privileges, provided that privileges in federal civil and criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Fed. R. Evid. 501.[20] Originally, the proposed Rules of Evidence defined nine specific testimonial privileges and indicated that, absent constitutional mandate, Act of Congress, or revision of the Rules, no other privileges would be recognized. *See* 56 F.R.D. 183, 230-61 (1972) (Proposed Rules 501-513). Congress rejected the rigid framework of the original proposal in favor of Rule 501's flexible mandate. *See Jaffee*, 518 U.S. at 8 n.7; *Trammel* v. *United States*, 445 U.S. 40, 47 (1980).

In interpreting Rule 501, this Court has repeatedly noted Congress' intent to keep the federal law of privilege fluid. "In rejecting the proposed Rules and enacting Rule 501," the Court has held, "Congress manifested an affirmative intention not to freeze the law of privilege," but rather to "leave the door open to change," *id.*, and to " 'continue the evolutionary development of testimonial privileges.' " *Jaffee*, 518 U.S. at 9 (quoting *Trammel*, 445 U.S. at 47).

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[20] Federal Rule of Evidence 1101 makes clear that Rule 501 applies to grand jury proceedings.

The legislative history makes clear that, in approving this flexible approach, Congress expected the federal courts to determine whether a reporter's privilege exists under federal common law. As Congressman Hungate, Chairman of the House Judiciary Subcommittee on Criminal Justice, stated when presenting the Conference Report to the House, Rule 501 "permits the courts to develop a privilege for newspaperpeople on a case-by-case basis." 120 CONG. REC. H12253-54 (daily ed. Dec. 18, 1974). *See also* 23 Wright & Graham, FEDERAL PRACTICE AND PROCEDURE § 5426 (1980 & Supp. 2004) ("The legislative history suggests that Congress expected that Rule 501 would be used to create a privilege for newsmen.").

In *Jaffee*, the Court recognized a psychotherapist/patient and social worker/client privilege under Rule 501, noting that protecting such communications serves important private and public interests. 518 U.S. at 11. The same is true here. As the Third Circuit observed in recognizing a reporter's privilege under Rule 501:

> The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring. A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis. This in turn will seriously erode the essential role played by the press in the dissemination of information to the public.

Riley, 612 F.2d at 714 (citations omitted).

Like the privilege recognized in *Jaffee*, the important interests served by the reporter's privilege also outweigh the likely evidentiary costs because, as Judge Tatel observed, without a privilege, sources will be far less likely to make statements to the press that prosecutors and/or litigants will be interested in discovering. App. 47a.

In *Jaffee* this Court recognized a privilege under Rule 501 in good part because "all 50 States and the District of Columbia

have enacted into law some form of psychotherapist privilege." 518 U.S. at 12. A similar state-by-state consensus exists now regarding the reporter's privilege. Today, 31 states (plus the District of Columbia) have "shield laws."[21] Of the 19 states without statutory shield laws, courts in all but one (Wyoming—which has remained silent on the issue) have recognized a reporter's privilege in one context or another.[22] In fact, the pro-

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[21] *See* Ala. Code § 12-21-142; Alaska Stat. §§ 09.25.300-.390; Ariz. Rev. Stat. §§ 12-2214, 12-2237; Ark. Code Ann. § 16-85-510; Cal. Evid. Code § 1070; Colo. Rev. Stat. § 13-90-119; D.C. Code Ann. §§ 16-4702, 4703; Del. Code Ann. tit. 10, §§ 4320-26; Fla. Stat. Ann. § 90.5015; Ga. Code Ann. § 24-9-30; 735 Ill. Comp. Stat. Ann. 5/8-901 to 8-909; Ind. Code Ann. §§ 34-46-4-1, 34-46-4-2; Ky. Rev. Stat. Ann. § 421.100; La. Rev. Stat. Ann. §§ 45:1451-1459; Md. Code. Ann., Cts. & Jud. Proc. § 9-112; Mich. Comp. Laws Ann.§§ 767.5a, 767A.6; Minn. Stat. Ann. §§ 595.021-.025; Mont. Code Ann. §§ 26-1-902, 26-1-903; Neb. Rev. Stat. §§ 20-144 to 20-147; Nev. Rev. Stat. Ann. 49.275, 49.385; N.J. Stat. Ann. §§ 2A:84A-21.1 to 21.5; N.M. Stat. Ann. § 38-6-7; N.Y. Civ. Rights Law § 79-h; N.C. Gen. Stat. § 8-53.11; N.D. Cent. Code § 31-01-06.2; Ohio Rev. Code Ann. §§ 2739.04, 2739.12; Okla. Stat. Ann. tit. 12, § 2506; Or. Rev. Stat. §§ 44.510-.540; 42 Pa. Cons. Stat. Ann. § 5942(a); R.I. Gen. Laws §§ 9-19.1-1 to 9-19.1-3; S.C. Code Ann. § 19-11-100; Tenn. Code Ann. § 24-1-208.

[22] *See generally New York Times* v. *Gonzales*, 2005 WL 427911, *41 n.37 & n.38 (collecting cases). *See Connecticut State Board of Labor Relations* v. *Fagin*, 370 A.2d 1095 (Conn. Super. Ct. 1976) (civil); *De Roburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Haw. 1981) (civil); *Idaho* v. *Salsbury*, 924 P.2d 208 (Idaho 1996) (criminal); *In re Wright*, 700 P.2d 40 (Idaho 1985) (criminal); *Winegard* v. *Oxberger*, 258 N.W.2d 847 (Iowa 1977) (civil), *cert. denied*, 436 U.S. 905 (1978); *In re Pennington*, 581 P.2d 812 (Kan. 1978) (criminal), *cert. denied*, 440 U.S. 929 (1979); *In re Letellier*, 578 A.2d 722 (Me. 1990) (grand jury); *In re John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991) (grand jury); *Sinnott* v. *Boston Retirement Board*, 524 N.E.2d 100 (Mass.) (civil), *cert. denied*, 488 U.S. 980 (1988); *Ayash* v. *Dana-Farber Cancer Institute*, 822 N.E.2d 667 (Mass. 2005) (civil); *Missouri ex rel. Classic III, Inc.*, 954 S.W.2d 650 (Mo. Ct. App. 1997) (civil); *New Hampshire* v. *Siel*, 444 A.2d 499 (N.H. 1982) (criminal); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977) (civil statutory proceeding); *Hopewell* v. *Midcontinent Broadcasting Corp.*, 538 N.W.2d 780 (S.D. 1995) (civil), *cert. denied*, 519 U.S.

tection of confidential sources has now even been recognized in countries around the world that typically afford far less protection to journalists than the United States. *See, e.g., Goodwin* v. *United Kingdom*, [1996] 22 E.H.R.R. 123 (European Ct. of Human Rights) (holding that Article 10 of the European Convention on Human Rights provides protection against the disclosure of confidential sources, and stating that "[p]rotection of journalistic sources is one of the basic conditions for press freedom"); *Roeman and Schmit* v. *Luxembourg*, Applic. No. 51772/99 (European Ct. of Human Rights 2003) (same); *R.* v. *National Post*, [2004] 236 D.L.R. (4th) 551 (quashing order to compel reporter to disclose his confidential sources in connection with criminal investigation because the "eroding of the

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817 (1996); *Dallas Morning News Co.* v. *Garcia*, 822 S.W.2d 675 (Tex. App. 1991) (civil); *Vermont* v. *St. Peter*, 315 A.2d 254 (Vt. 1974) (criminal); *Brown* v. *Virginia*, 204 S.E.2d 429 (Va.) (criminal), *cert. denied*, 419 U.S. 966 (1974); *Clemente* v. *Clemente*, 56 Va. Cir. 530 (2001) (civil); *Philip Morris Co.* v. *ABC, Inc.*, 36 Va. Cir. 1 (1995) (civil); *Clampitt* v. *Thurston County*, 658 P.2d 641 (Wash. 1983) (civil); *Senear* v. *Daily Journal-American*, 641 P.2d 1180 (Wash. 1982) (civil); *Washington* v. *Rinaldo*, 673 P.2d 614 (Wash. Ct. App. 1983) (criminal), *aff'd on other grounds*, 689 P.2d 392 (Wash. 1984); *West Virginia ex rel. Charleston Mail Ass'n* v. *Ranson*, 488 S.E.2d 5 (W. Va. 1997) (criminal); *West Virginia ex rel. Hudok* v. *Henry*, 389 S.E.2d 188 (W. Va. 1989) (civil); *Kurzynski* v. *Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995) (civil); *Zelenka* v. *Wisconsin*, 266 N.W.2d 279 (Wis. 1978) (criminal); *Wisconsin* v. *Knops*, 183 N.W.2d 93 (Wis. 1971) (grand jury). In Mississippi, a trial court has concluded that the state constitution provides a basis for a qualified reporter's privilege. *Hawkins* v. *Williams*, No. 29,054 (Miss. Cir. Ct. Hinds Co. Mar. 16, 1983) (unpublished opinion). In both Mississippi and Utah, trial courts have applied the reporter's privilege in both civil and criminal contexts. *See Pope* v. *Village Apartments, Ltd.*, No. 92-71-436 CV (Miss. 1st Cir. Ct. Jan. 23, 1995) (unpublished opinion) (Gibbs, J.) (civil); *Mississippi* v. *Hand*, No. CR89-49-C(T-2) (Miss. 2d Cir. Ct. July 31, 1990) (unpublished opinion) (criminal); *In re Grand Jury Subpoena*, No. 38664 (Miss. 1st Cir. Ct. Oct. 4, 1989) (unpublished opinion) (grand jury); *Lester* v. *Draper*, No. 000906048 (Utah 3d Dist. Ct. Jan. 16, 2002) (Frederick, J.) (unpublished opinion) (civil case); *Utah* v. *Koolmo*, No. 981905396 (Utah 3d Dist. Ct. Mar. 29, 1999) (Hilder, J.) (unpublished opinion) (criminal case).

ability of the press to perform its role in society cannot be outweighed by the Crown's investigation" and compelling a reporter to "break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information").[23]

The national consensus[24] in favor of a journalist's privilege was simply ignored by the panel majority below. So too was this Court's admonition in *Jaffee* that courts must consider whether "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. 518 U.S. at 13. The situation in the District of Columbia is illustrative. If Ms. Miller had been subpoenaed by a District of Columbia prosecutor, the information requested would be absolutely privi-

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[23] *See also European Pacific Banking Corp.* v. *Television New Zealand Ltd.*, [1994] 3 N.Z.L.R. 43 (Ct. App. Wellington) (New Zealand) (establishing general rule protecting confidential sources in all cases, both in discovery and at trial); *Oyegbemi* v. *Attorney-General of the Federation & Ors*, [1982] F.N.L.R. 192 (Fed. of Nigeria LR) (Nigeria); *Prosecutor* v. *Radoslav Brdjanin and Momir Talic*, Case No. IT-99-36-AR 73.9 (International Criminal Tribunal for former Yugoslavia 2002) (establishing qualified privilege for war correspondents even when no confidential sources are involved); Freedom of Press Act, Chapter 3, Article 1 (Sweden); Code of Criminal Procedure, Article 109(2) (France); Media Act of 1981, Article 31 (Austria); Criminal Procedure Code, Section 53 (Germany).

[24] Indeed, the near-unanimous consensus of the States on this point is far more impressive than the consensus among the states that led this Court to find that it was no longer consistent with the Eighth Amendment to permit imposition of the death penalty in cases involving the mentally retarded and those who committed capital offenses when under the age of eighteen. *See Atkins* v. *Virginia*, 536 U.S. 304, 313-15 (2002) (finding a sufficient consensus where 30 states prohibited imposition of the death penalty for the mentally retarded); *Roper* v. *Simmons*, 125 S. Ct. 1183,1192 (2005) (finding a sufficient consensus where 30 states prohibited imposition of the death penalty for those under 18).

leged;[25] down the street in federal court she now has no protection at all.

As all of this reflects, the opinion below cannot be reconciled with *Jaffee* on any level. Indeed, both Judge Sentelle and Judge Henderson simply declined to engage in the analysis mandated by *Jaffee*, concluding instead that only this Court or Congress could appropriately consider whether a reporter's privilege should be recognized. App. 24a-30a; 35a. Not only is that a rejection of *Jaffee*, it is a rejection of Congress' express instruction embodied in Rule 501 that it is the duty of the federal courts to develop testimonial privileges on the basis of "reason and experience." Quite literally, the panel majority adopted the reasoning of the two dissenting Justices in *Jaffee* in making clear their refusal, in the words of Judge Henderson, to "rid[e] *Jaffee* v. *Redmond* into the testimonial privilege frontier." App. 34a-35a (citation omitted).

The existence of a reporter's privilege under Rule 501 has been explicitly recognized by the Third Circuit in the context of civil and criminal proceedings. *See Riley*, 612 F.2d at 715 (recognizing federal common law privilege for reporters under Rule 501 in civil cases); *Cuthbertson*, 630 F.2d at 146 (criminal cases); *In re Grand Jury Subpoena of Williams*, 963 F.2d at 567 (grand jury proceedings). Federal district courts throughout the nation have also repeatedly recognized a reporter's privilege under federal common law. *See New York Times Co.* v. *Gonzales*, 2005 WL 427911, at *35-*36 (collecting cases). All of those rulings are in direct conflict not only with the decision below, but also with the Ninth Circuit's holding in *In re Grand Jury Proceedings*. *See* 5 F.3d at 402-03 (rejecting Third Circuit precedent).

This Court has yet to consider whether a reporter's privilege should be recognized under Rule 501. This case is an appropriate vehicle to resolve this important question.

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[25] *See* D.C. Code Ann. §§ 16-4702(1), 4703(b).

C. Review Is Warranted To Resolve A Conflict Among The Circuits As To Whether The Due Process Clause Permits A Contemnor To Be Imprisoned On The Basis Of Secret Evidence

For all its internal disagreement on other issues, the court of appeals agreed on a single proposition: based upon an *ex parte* submission of the Special Counsel that neither Ms. Miller nor her counsel was permitted to examine, the government had met whatever burden the First Amendment imposed upon it to justify an order requiring Ms. Miller to reveal her sources. The basis of that conclusion is set forth in eight pages of Judge Tatel's opinion—pages that are simply blank in the version of the opinion made available to Ms. Miller, her counsel and the public. Never before, to our knowledge, has a court of appeals sanctioned the imprisonment of a party on the basis of facts the party was never permitted to see or rebut in a passage of an opinion that neither the party nor the public was permitted to read.

In affirming the district court's orders to incarcerate Ms. Miller based on the *ex parte* submissions that neither she nor her counsel have ever seen, the decision below conflicts directly with decisions of the Second and Ninth Circuits holding that recalcitrant grand jury witnesses charged with civil contempt and facing incarceration are constitutionally entitled to examine the government's evidence against them. *See In re Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (holding that witness was denied a full and fair opportunity under the Due Process Clause "to confront all of the government's evidence, both documentary and testimonial" before being charged with civil contempt for giving false and evasive grand jury testimony); *United States* v. *Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (holding that grand jury witness charged with contempt for refusing to testify must "be allowed to probe all nonfrivolous defenses to contempt charge" because "[t]he constitutional guarantee of due process of law means more than a silhouette of justice; it requires that judicial determinations affecting the freedom of the individual be openly arrived at after full, fair, and

vigorous debate on both sides of all substantial issues.") (citations omitted).

More broadly, the court of appeals' decision cannot be reconciled with the fundamental principle that those facing a loss of liberty have a constitutional right to examine the Government's evidence so that they may adequately defend themselves. In *In re Oliver*, 333 U.S. 257 (1948), for example, this Court held that a grand jury witness jailed for criminal contempt based on apparent inconsistencies between his testimony and the secret testimony of another witness, had been deprived of due process. *Id.* at 273 ("In view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means at least that an accused cannot be thus sentenced to prison."). Similarly, in *Greene* v. *McElroy*, 360 U.S. 474 (1959), the Court held that a government contractor was entitled under the Due Process Clause to review secret investigative reports used by the government to justify the revocation of his security clearance despite government claims that "security considerations" prohibited their disclosure. The Court concluded that:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

Id. at 496.

In *Abourezk* v. *Reagan*, 785 F.2d 1043, 1060-61 (D.C. Cir. 1986) (Ginsburg, J.), *aff'd by an equally divided court*, 484 U.S. 1 (1987), then Judge Ginsburg noted her "grave concern" with the district court's heavy reliance upon three classified government affidavits in a challenge to the Secretary of State's

refusal to issue non-immigrant visas to certain aliens. Judge Ginsburg cautioned the district court "to make certain that plaintiffs are accorded access to the decisive evidence to the *fullest extent possible*, without jeopardizing legitimately raised national security interests." *Id.* at 1060 (emphasis added).

> It is a hallmark of our adversary system that we safeguard party access to the evidence tendered in support of a requested court judgment. The openness of judicial proceedings serves to preserve both the appearance and the reality of fairness in the adjudications of United States courts. It is therefore the firmly held main rule that a court may not dispose of the merits of a case on the basis of *ex parte, in camera* submissions. Exceptions to the main rule are both few and tightly contained.

Id. at 1060-61 (citations omitted).

The factual distinctions between these cases and the instant case identified by Judge Tatel, *see* App. 102a-103a, in no way diminish the force of petitioner's core due process argument that the government may not incarcerate someone on the basis of secret evidence. That is the central principle for which the cited cases stand, and which the court of appeals' decision offends. Moreover, any need to maintain grand jury secrecy can be vindicated fully through the use of protective orders that permit petitioner (or, at a minimum, petitioner's counsel) access to all relevant evidence.[26] Courts have permitted such access even to alleged enemy combatants, acknowledging that the Due Process Clause requires at least as much. *See United States* v. *Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004) (holding that defendant had a due process right to access to all evidence in government's possession material to his defense); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 452 (D.D.C. 2005) (describing procedures for disclosure of classified information to habeas peti-

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[26] Counsel to Ms. Miller proposed to both the district court and the court of appeals that they were prepared to review all material submitted to the district court without making it available to their client. *See, e.g.*, Appellants' Brief at 51.

tioners' counsel holding security clearances); *see also id.* at 468 (finding military tribunals reviewing enemy combatant determinations violated due process rights of detainees because "[n]o detainee . . . was ever permitted access to any classified information nor was any detainee permitted to have an advocate review and challenge the classified evidence on his behalf"). *See generally* Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005). American journalists should not be accorded fewer due process rights than alleged enemy combatants.

Because the court of appeals' decision cannot be reconciled with the cited decisions of the Second and Ninth Circuits and settled due process principles articulated by this Court and others, review by this Court is warranted to consider these fundamental questions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued December 8, 2004 Decided February 15, 2005

No. 04–3138

IN RE: GRAND JURY SUBPOENA, JUDITH MILLER

Consolidated with
04–3139, 04–3140

Appeals from the United States District Court
for the District of Columbia
(No. 04mc00407)
(No. 04mc00460)
(No. 04mc00461)

Floyd Abrams argued the cause for appellants. With him on the briefs was *Joel Kurtzberg*. *Donald J. Mulvihill* entered an appearance.

Reid Alan Cox was on the brief for *amicus curiae* Center for Individual Freedom in support of appellants.

Theodore J. Boutrous, Jr. and *Thomas H. Dupree, Jr.* were on the brief for *amici curiae* Magazine Publishers of America, Inc., et al. in support of appellants.

James P. Fleissner, Assistant U.S. Attorney, argued the cause and filed the brief for appellee.

Before: SENTELLE, HENDERSON and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* SENTELLE.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Opinion concurring in the judgment filed by *Circuit Judge* TATEL.

SENTELLE, *Circuit Judge:* An investigative reporter for the New York Times; the White House correspondent for the weekly news magazine Time; and Time, Inc., the publisher of Time, appeal from orders of the District Court for the District of Columbia finding all three appellants in civil contempt for refusing to give evidence in response to grand jury subpoenas served by Special Counsel Patrick J. Fitzgerald. Appellants assert that the information concealed by them, specifically the identity of confidential sources, is protected by a reporter's privilege arising from the First Amendment, or failing that, by federal common law privilege. The District Court held that neither the First Amendment nor the federal common law provides protection for journalists' confidential sources in the context of a grand jury investigation. For the reasons set forth below, we agree with the District Court that there is no First Amendment privilege protecting the evidence sought. We further conclude that if any such common law privilege exists, it is not absolute, and in this

case has been overcome by the filings of the Special Counsel with the District Court. We further conclude that other assignments of error raised by appellants are without merit. We therefore affirm the decision of the District Court.

I. Background

According to the briefs and record before us, the controversy giving rise to this litigation began with a political and news media controversy over a sixteen–word sentence in the State of the Union Address of President George W. Bush on January 28, 2003. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." The ensuing public controversy focused not on the British source of the alleged information, but rather on the accuracy of the proposition that Saddam Hussein had sought uranium, a key ingredient in the development of nuclear weaponry, from Africa. Many publications on the subject followed. On July 6, 2003, the New York Times published an op–ed piece by former Ambassador Joseph Wilson, in which he claimed to have been sent to Niger in 2002 by the Central Intelligence Agency ("CIA") in response to inquiries from Vice President Cheney to investigate whether Iraq had been seeking to purchase uranium from Niger. Wilson claimed that he had conducted the requested investigation and reported on his return that there was no credible evidence that any such effort had been made.

On July 14, 2003, columnist Robert Novak published a column in the Chicago Sun–Times in which he asserted that the decision to send Wilson to Niger had been made "routinely without Director George Tenet's knowledge," and, most significant to the present litigation, that "two senior administration officials" told him that Wilson's selection was at the suggestion of Wilson's wife, Valerie Plame, whom Novak described as a CIA "operative on weapons of mass destruction." Robert Novak, *The Mission to Niger*, CHI. SUN–TIMES, July 14, 2003,

at 31. After Novak's column was published, various media accounts reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's selection for the mission to Niger. One such article, published by Time.com on July 17, 2003, was authored in part by appellant Matthew Cooper. That article stated that:

> Some government officials have noted to Time in interviews . . . that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction . . . [and] have suggested that she was involved in the husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore . . . .

Matthew Cooper et al., *A War on Wilson?*, TIME.COM, *at http://www.time.com/time/nation/article/0,8599, 465270,00.html* (Dec. 13, 2004). Other media accounts reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Mike Allen & Dana Priest, *Bush Administration is Focus of Inquiry; CIA Agent's Identity was Leaked to Media*, WASH. POST, Sept. 28, 2003, at A1. The Department of Justice undertook an investigation into whether government employees had violated federal law by the unauthorized disclosure of the identity of a CIA agent. *See, e.g.*, 50 U.S.C. § 421 (criminalizing, *inter alia*, disclosure of the identity of a covert agent by anyone having had authorized access to classified information). As the investigation proceeded, in December of 2003, the Attorney General recused himself from participation and delegated his full authority in the investigation to the Deputy Attorney General as Acting Attorney General. The Deputy, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel and delegated full authority concerning the investigation to him. As part of the ongoing investigation, a grand jury investigation began in January of 2004.

In cooperation with Special Counsel Fitzgerald, the grand jury conducted an extensive investigation. On May 21, 2004, a grand jury subpoena was issued to appellant Matthew Cooper, seeking testimony and documents related to two specific articles dated July 17, 2003, and July 21, 2003, to which Cooper had contributed. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel. Instead, Cooper moved to quash the subpoena on June 3, 2004. On July 6, 2004, the Chief Judge of the United States District Court for the District of Columbia denied Cooper's motion in open court, and confirmed the denial with reasoning set forth in a written order issued on July 20, 2004.

A further grand jury subpoena was issued to Time, Inc., seeking the same documents requested in the subpoena to Cooper. Time also moved to quash its subpoena. On August 6, 2004, the District Court denied Time's motion. Both Cooper and Time refused to comply with the subpoenas despite the District Court's denial of their motions to quash. The District Court thereafter found that Cooper and Time had refused to comply with the subpoenas without just cause and held them in civil contempt of court. After both Cooper and Time had filed appeals, and further negotiations between Special Counsel and the two had proceeded, Cooper agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release. Cooper and Time fulfilled their obligations under the agreement, the Special Counsel moved to vacate the District Court's contempt order, and the notices of appeal were voluntarily dismissed.

On September 13, 2004, the grand jury issued a further subpoena to Cooper seeking "[a]ny and all documents . . . [relating to] conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame, a/k/a Valerie Wil-

son, a/k/a Valerie Plame (the wife of former Ambassador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." An August 2, 2004 subpoena to Time requested "[a]ll notes, tape recordings, e-mails, or other documents of Matthew Cooper relating to the July 17, 2003 Time.com article entitled 'A War on Wilson?' and the July 21, 2003 Time Magazine article entitled, 'A Question of Trust.' " Cooper and Time again moved to quash the subpoenas, and on October 7, 2004, the District Court denied the motion. The two refused to comply with the subpoenas, and on October 13, 2004, the District Court held that their refusal was without just cause and held both in contempt.

In the meantime, on August 12 and August 14, grand jury subpoenas were issued to Judith Miller, seeking documents and testimony related to conversations between her and a specified government official "occurring from on or about July 6, 2003, to on or about July 13, 2003, . . . concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambassador Wilson) or concerning Iraqi efforts to obtain uranium." Miller refused to comply with the subpoenas and moved to quash them. The District Court denied Miller's motion to quash. Thereafter, the court found that Miller had refused to comply without just cause and held her in civil contempt of court also. She also has appealed.

The appellants have proceeded with common counsel and common briefing in a consolidated proceeding before this court. They assert four theories for reversal. Their first claim is that the First Amendment affords journalists a constitutional right to conceal their confidential sources even against the subpoenas of grand juries. Secondly, they claim that reporters enjoy an evidentiary privilege under the common law to conceal confidential sources. Adjunct to this claim, while denying that the privilege is less than absolute, they argue that if the privilege is in fact qualified, the United States has not overcome the privilege. Thirdly, appellants argue that their due process rights were violated by the Special Counsel's ex parte and in camera sub-

mission of evidence to the court to establish that the United States had overcome any qualified privilege. Finally, they argue that the Special Counsel failed to comply with Department of Justice guidelines for the issuance of subpoenas to journalists, and that the failure to comply is an independent ground for reversal of their contempt conviction. Finding no grounds for relief under the First Amendment, due process clause, or Department of Justice guidelines, and persuaded that any common law privilege that exists would be overcome in this case, we affirm the judgment of the District Court for the reasons set out more fully below.

II. Analysis

A. *The First Amendment Claim*

In his opinion below, the Chief District Judge held that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection." *In Re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). Appellants argue that "this proposition of law is flatly contrary to the great weight of authority in this and other circuits." Appellants are wrong. The governing authority in this case, as the District Court correctly held, comes not from this or any other circuit, but the Supreme Court of the United States. In *Branzburg v. Hayes*, 408 U.S. 665 (1972), the Highest Court considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar.

Like the present case, *Branzburg* was a consolidated proceeding involving multiple contempt proceedings against news media defendants. The named petitioner, Branzburg, had been held in contempt in two related proceedings, arising from one extended task of investigative journalism. The first arose from an article published by his employer, a daily newspaper, describing his observation of two Kentucky residents synthesizing hashish from marijuana as part of a profitable illegal drug operation. The article included a photograph "of hands working

above a laboratory table on . . . a substance identified . . . as hashish." 408 U.S. at 667. A Kentucky grand jury subpoenaed the journalist who "refused to identify the individuals he had seen possessing marihuana or the persons he had seen making hashish from marihuana." *Id.* at 668. Branzburg claimed privilege both under the First Amendment of the United States Constitution and various state statutory and constitutional provisions. He was held in contempt and the proceeding eventually made its way to the Supreme Court.

The second case involving petitioner Branzburg arose out of a later article published by the same newspaper describing the use of drugs in Frankfort, Kentucky. According to the article, this publication was the product of two weeks spent interviewing drug users in the area. The article further reported that its author had seen some of his sources smoking marijuana. The article related numerous conversations with and observations of unnamed drug users. Branzburg was again subpoenaed to appear before a Kentucky grand jury "to testify in the matter of violation of statutes concerning use and sale of drugs," *id.* at 669 (internal quotation marks omitted). Branzburg moved to quash the subpoena. The motion was denied. The journalist sought the protection of the Kentucky Court of Appeals by way of mandamus and prohibition, claiming "that if he were forced to go before the grand jury or to answer questions regarding the identity of informants or disclose information given him in confidence, his effectiveness as a reporter would be greatly damaged." *Id.* at 670. The Kentucky courts rejected Branzburg's claim of a First Amendment privilege. Again, he petitioned for certiorari in the Supreme Court.

The consolidated petitions in *Branzburg* also included *In re Pappas*. Petitioner Pappas was a television newsman–photographer for a Massachusetts television station. On July 30, 1970, during a time of civil unrest in New Bedford, Massachusetts, he gained entrance to the headquarters of the Black Panther Party, upon his agreement not to disclose anything he saw or heard inside the headquarters. Subsequently, he was subpoenaed to

appear before a Massachusetts grand jury. Although he appeared and answered other questions, he refused to answer any questions about what had taken place inside the Black Panther headquarters, "claiming that the First Amendment afforded him a privilege to protect confidential informants and their information." *Id.* at 673. The Massachusetts trial court denied his motion to quash made on First Amendment and other grounds and ruled that the journalist "had no constitutional privilege to refuse to divulge to the grand jury what he had seen and heard, including the identity of persons he had observed." *Id.* Like Branzburg, Pappas petitioned for certiorari to the United States Supreme Court.

In the final petition consolidated in the *Branzburg* proceedings, the Court considered the petition for certiorari of the United States from a decision of the Ninth Circuit Court of Appeals, *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970), in which the circuit had recognized a qualified testimonial privilege for newsmen arising from the First Amendment and allowing a reporter claiming protection under the privilege to refuse to testify before a grand jury investigating allegations of violations of numerous criminal statutes by the Black Panther Party in California. The reporter in *Caldwell* had engaged in investigative journalism directed toward the Black Panthers at a time when they were suspected of such crimes as making threats against the President of the United States and a possible conspiracy to assassinate the President, as well as interstate travel to incite rioting and the commission of mail frauds and swindles. He claimed to have obtained information from confidential informants.

As can be seen from the account of the underlying facts in *Branzburg*, there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today. Each of the reporters in *Branzburg* claimed to have received communications from sources in confidence, just as the journalists before us claimed to have done. At least one of the petitioners in *Branzburg* had wit-

nessed the commission of crimes. On the record before us, there is at least sufficient allegation to warrant grand jury inquiry that one or both journalists received information concerning the identity of a covert operative of the United States from government employees acting in violation of the law by making the disclosure. Each petitioner in *Branzburg* and each journalist before us claimed or claims the protection of a First Amendment reporter's privilege. The Supreme Court in no uncertain terms rejected the existence of such a privilege. As we said at the outset of this discussion, the Supreme Court has already decided the First Amendment issue before us today.

In rejecting the claim of privilege, the Supreme Court made its reasoning transparent and forceful. The High Court recognized that "the grand jury's authority to subpoena witnesses is not only historic . . . but essential to its task." 408 U.S. at 688 (citation omitted). The grand juries and the courts operate under the "longstanding principle that "the public has a right to every man's evidence,' except for those persons protected by constitutional, common law, or statutory privilege." *Id.* (citations and internal punctuation omitted). The Court then noted that "the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self– incrimination." *Id.* at 689–90. The Court then expressly declined "to create another by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy." *Id.* at 690. In language as relevant to the alleged illegal disclosure of the identity of covert agents as it was to the alleged illegal processing of hashish, the Court stated that it could not "seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about a crime than to do something about it." *Id.* at 692.

Lest there be any mistake as to the breadth of the rejection of the claimed First Amendment privilege, the High Court went on to recognize that "there remain those situations where a source

is not engaged in criminal conduct but has information suggesting illegal conduct by others." *Id.* at 693. As to this category of informants, the Court was equally adamant in rejecting the claim of First Amendment privilege:

> [W]e cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.

Id. at 695.

The *Branzburg* Court further supported the rejection of this claimed privilege by the commonsense observation that "it is obvious that agreements to conceal information relevant to the commission of crime have very little to recommend them from the standpoint of public policy." *Id.* at 696. While the Court recognized the right of the press to abide by its agreements not to publish information that it has, the Court stated unequivocally that "the right to withhold news is not equivalent to a First Amendment exemption from an ordinary duty of all other citizens to finish relevant information to a grand jury performing an important public function." *Id.* at 697.

We have pressed appellants for some distinction between the facts before the Supreme Court in *Branzburg* and those before us today. They have offered none, nor have we independently found any. Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source. The Highest Court has spoken and never revisited the question Without doubt, that is the end of the matter.

Despite the absolute and unreversed answer to the question of constitutional privilege by the Supreme Court in *Branzburg*, appellants nonetheless persist in arguing that the District Court

erred in concluding that journalists subpoenaed to reveal their confidential sources before federal grand juries enjoy no First Amendment protection. They base this argument on the concurring opinion of Justice Powell in *Branzburg* and a case from this circuit, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). These authorities, either separately or together, provide no support for the existence of such a privilege protecting reporters subpoenaed to a grand jury. Appellants' argument concerning Justice Powell's concurrence begins with the fact that the decision of the Supreme Court was reached by a 5–4 divided Court. Thus, each of the justices joining in the result was essential to the result. Therefore, appellants argue, it is the opinion of the least encompassing justice which determines the precedent set by the decision rather than the decision which appellants style a "plurality" opinion authored by Justice White. In support of this proposition, they advance an argument that first admits that when the opinion of an individual justice is not needed for a majority his separate opinion is not a gloss giving authoritative definition to the majority opinion in which he did not join, but rather is no more than his separate thoughts, and "the meaning of a majority opinion is to be found within the opinion itself." *McKoy v. North Carolina*, 494 U.S. 433, 488 n.3 (1990) (Blackmun, J., concurring). But, appellants argue, when the individual justice is needed to constitute the majority, "the opinion is not a majority except to the extent that it agrees with his views. What he writes is not a 'gloss' but the least common denominator." That is to say, the separate opinion "cannot add to what the majority opinion holds, binding the other four justices to say what they have not said; but it can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority. . . ." *Id.* at 462 n.3 (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting).

Without attempting to resolve any dispute or difference that may exist between Justice Blackmun and the three dissenting justices in *McKoy*, even if we accept Justice Scalia's analysis at

full value, it does not help appellants in this case. Justice Powell's concurring opinion was not the opinion of a justice who refused to join the majority. He joined the majority by its terms, rejecting none of Justice White's reasoning on behalf of the majority. He wrote separately "to emphasize" what seemed to him "to be the limited nature of the Court's holding." 408 U.S. at 709 (Powell, J., concurring). Justice White's opinion is not a plurality opinion of four justices joined by a separate Justice Powell to create a majority, it is the opinion of the majority of the Court. As such it is authoritative precedent. It says what it says. It rejects the privilege asserted by appellants.

Nonetheless, appellants urge that Justice Powell must have been contemplating the creation or recognition of some further sort of First Amendment privilege for reporters asserting confidential sources, else why would he have bothered writing? To that, the United States replies that by its terms Justice Powell's opinion recognizes only that

> if the newsman is called upon to give information bearing only on a remote and tenuous relationship to the subject investigation, of if he has some other reason to believe that his testimony implicates confidential source relationships *without a legitimate need of law enforcement*, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

Id. at 710 (emphasis added).

Therefore, the United States contends, Justice Powell, who expressed no disagreement with the majority about the existence of a constitutional privilege, only emphasized that there would be First Amendment protection in cases of bad faith investigations. Appellants counter that Justice Powell could not have meant what the United States argues, as this would have given reporters no more protection than other citizens. However, they never make it clear why they are convinced that Justice Powell must have intended to give reporters more protection than other citizens. The Constitution protects all citizens, and there is no

reason to believe that Justice Powell intended to elevate the journalistic class above the rest. *Cf. Branzburg* at 690 ("the only testimonial privilege for unofficial witnesses that is rooted in the Federal Constitution is the Fifth Amendment privilege against compelled self–incrimination.").

In any event, whatever Justice Powell specifically intended, he joined the majority. Not only did he join the majority in name, but because of his joinder with the rest of a majority, the Court reached a result that rejected First Amendment privilege not to testify before the grand jury for reporters situated precisely like those in the present case. As we noted above, there is no factual difference between *Branzburg* and the present case. If Justice Powell in any way meant to afford more protection than was afforded by the rest of the majority, that protection cannot possibly extend to appellants as *Branzburg* is directly on point and reached a result in which Justice Powell joined, rejecting the applicability of constitutional privilege.

Zerilli cannot possibly help appellants, although they assert that *Zerilli*, citing Justice Powell's "deciding vote" in *Branzburg*, recognized, at least in dicta, a reporter's privilege in civil cases and held that *Branzburg* was not controlling as to that issue. Indeed, the *Zerilli* Court expressly distinguished its case from *Branzburg*. "Although *Branzburg* may limit the scope of a reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective law enforcement is absent, that case is not controlling." 656 F.2d at 705. *Zerilli* has no force in the present case. Even if *Zerilli* states the law applicable to civil cases, this is not a civil case. *Zerilli* could not subtract from the Supreme Court's holding in *Branzburg*. *Zerilli*, along with several other lower court decisions cited by appellants, may recognize or at least suggest the possibility of privileges under various circumstances. None of them can change the law applicable to grand juries as set forth in *Branzburg*. As the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477, 484 (1989). The Supreme Court has not overruled Branzburg.

B. *The Common Law Privilege*

Appellants argue that even if there is no First Amendment privilege protecting their confidential source information, we should recognize a privilege under federal common law, arguing that regardless of whether a federal common law privilege protecting reporters existed in 1972 when *Branzburg* was decided, in the intervening years much has changed. While appellants argue for an absolute privilege under the common law, they wisely recognize the possibility that a court not recognizing such an absolute privilege might nonetheless find a qualified privilege. They therefore also argue that if there is a qualified privilege, then the government has not overcome that qualified privilege. The Court is not of one mind on the existence of a common law privilege. Judge Sentelle would hold that there is no such common law privilege for reasons set forth in a separate opinion. Judge Tatel would hold that there is such a common law privilege. Judge Henderson believes that we need not, and therefore should not, reach that question. However, all believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing. All further believe, for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome. Therefore, the common law privilege, even if one exists, does not warrant reversal.

C. *The Due Process Argument*

While appellants insist that their privilege is absolute, they assert a secondary line of argument that if their privilege is conditional, then their due process rights have been violated by the refusal of the Special Counsel and the District Court to provide them access to the Special Counsel's secret evidentiary submissions in support of the enforcement of the subpoenas. This argument is without merit. As appellants themselves admit in their brief, this circuit has recognized that "a district court can ensure that [grand jury] secrecy is protected by provisions for sealed, or when necessary *ex parte*, filings." *In re Grand Jury*, 121 F.3d 729, 757 (D.C. Cir. 1997). Indeed, the rule of grand jury secrecy is so well established that we have noted that "[t]here is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm." *In re Sealed Case*, 199 F.3d 522, 526 (D.C. Cir. 2000) (collecting authorities).

As the Supreme Court has reminded us on occasion, "the grand jury is an institution separate from the courts." *United States v. Williams*, 504 U.S. 36, 47 (1992). The function of that separate institution is to "serv[e] as a kind of buffer or referee between the government and the people." *Id.* The function of the grand jury "depends on 'maintaining the secrecy of the grand jury proceedings in the federal courts.' " *In re Sealed Case*, 199 F.3d at 526 (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 (1958)). The authorities collected in *In re Sealed Case* recite the broad variety of circumstances in which the courts have upheld this grand jury secrecy, a secrecy that has been the persistent vale for grand jury proceedings for at least four hundred years. *See Douglas Oil v. Petrol Stops Northwest*, 441 U.S. 211, 218 n.9 (1979) ("Since the 17th century, grand jury proceedings have been closed to the public, and records of such proceedings have been kept from the public eye.").

In the *Douglas Oil* decision, the Supreme Court catalogs multiple reasons for preserving the ancient secrecy of the grand jury:

> (1) disclosure of pre–indictment proceedings would make many prospective witnesses "hesitant to come forward voluntarily, knowing that those against whom they testify would be aware of that testimony"; (2) witnesses who did appear "would be less likely to testify fully and frankly as they would be open to retribution as well as inducements"; and (3) there "would be the risk that those about to be indicted would flee or would try to influence individual grand jurors to vote against indictment."

In re North (Omnibus Order), 16 F.3d 1234, 1242 (D.C. Cir., Spec. Div., 1994) (quoting *Douglas Oil Co.*, 441 U.S. at 218–19).

Appellants have offered nothing to take the present grand jury investigation outside the general rule, let alone elevate their objections to constitutional due process status. Indeed, appellants' argument is principally built around a case from another circuit never authoritative here, no longer authoritative in the circuit of its origin, and distinguishable on its facts from the beginning. In *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), the court ruled that a defendant who had been held in contempt for refusing to furnish finger and palm print exemplars to a federal grand jury was deprived of her due process rights when the district court refused to let her inspect an ex parte government affidavit upon which the court had determined that the grand jury's request was reasonable. The Ninth Circuit itself has since declared that "to the extent that our decision in *United States v. Dinsio* . . . may be considered to support the witness in his refusal to cooperate, it has been superseded by *United States v. Mara* [410 U.S. 19 (1973)], and *United States v. Dionisio*, 410 U.S. 1 (1973)." *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975). The Ninth Circuit went on to say "nothing in the law of this circuit now requires a court to interrupt a grand jury while a recalcitrant witness produces a series of mini trials challenging the reasonableness of the government's efforts to obtain fingerprint, voice, or handwriting exemplars or the relevance of such exemplars to the government's case." *Id.*

Similarly, *Dinsio* was never the law of this circuit, just as it is no longer the law of the Ninth Circuit, and nothing in the law of the District of Columbia Circuit requires or has ever required a district court to interrupt the grand jury while a recalcitrant witness enjoys a series of mini trials over his access to materials cloaked by grand jury secrecy.

Assuming for the sake of this case that the general rule of grand jury secrecy is not sufficient to justify the District Court's use of *in camera* and *ex parte* proceedings, we further note that we have approved the use of such a procedure in other cases raising privilege claims. In *In re Sealed Case No. 98–377*, 151 F.3d 1059 (D.C. Cir. 1998), a case, like this one, involving the use of *in camera* and *ex parte* proceedings in the context of a Rule 6(e) motion by the government, we upheld their use, and in so doing, relied, at least in part, on precedent established in privilege analysis. We observed there that "courts often use *in camera, ex parte* proceedings to determine the propriety of a crime fraud exception to the attorney–client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *Id.* at 1075 (citing *In re Grand Jury*, 103 F.3d 1140, 1145 (3d Cir.), *cert. denied sub nom. Roe v. United States*, 520 U.S. 1253 (1997)). Having previously noted the propriety of the procedures to protect the well–established attorney–client privilege, we are persuaded that a similar protection of grand jury secrecy is appropriate to protect whatever privilege, if any, may exist between a reporter and a confidential source.

We affirm the District Court's ruling on the maintenance of the seal of grand jury secrecy.

D. *Department of Justice Guidelines*

In their final argument for reversal of the District Court's contempt finding, appellants contend that the Special Counsel did not comply with the Department of Justice guidelines for issuing subpoenas to news media and that such failure provides an independent basis for reversal. The District Court expressed its

doubt that the DOJ guidelines were enforceable, but found that even if they were, Special Counsel had fully complied with the guidelines. Because we conclude that the guidelines create no enforceable right, we need not reach the question of the Special Counsel's compliance.

The guidelines in question are set forth in 28 C.F.R. § 50.10 and the United States Attorney's Manual, § 9–2.161. Those guidelines provide that subpoenas for testimony by news media must be approved by the Attorney General, a requirement not pertinent in the present case as the Special Counsel had received delegation of all the Attorney General's authority, and should meet the following standards:

(a) "In criminal cases, there should be reasonable grounds to believe, based on information obtained from nonmedia sources, that a crime has occurred, and that the information sought is essential to a successful investigation–particularly with reference to establishing guilt or innocence. The subpoena should not be used to obtain peripheral, nonessential, or speculative information." 28 C.F.R. § 50.10(f)(1).

(b) Before issuing a subpoena to a member of the news media, all reasonable efforts should be made to obtain the desired information from alternative sources. *Id.* at §§ 50.10(b), 50.10(f)(3);

(c) Wherever possible, subpoenas should be directed at information regarding a limited subject matter and a reasonably limited period of time. Subpoenas should avoid requiring production of a large volume of unpublished materials and provide reasonable notice of the demand for documents. *Id.* at § 50.10(f)(6);

(d) "The use of subpoenas to members of the news media should, except under exigent circumstances, be limited to the verification of published information and to such surrounding circumstances as relate to

the accuracy of the published information." *Id.* at § 50.10(f)(4); and

(e) When issuance of a subpoena to a member of the media is contemplated, the government shall pursue negotiations with the relevant media organization. The negotiations should seek accommodation of the interests of the grand jury and the media. Where the nature of the investigation permits, the government should make clear what its needs are in a particular case as well as its willingness to respond to particular problems of the media. *Id.* at § 50.10(c).

However, as the District Court correctly observed, the guidelines expressly state that they do "not create or recognize any legally enforceable right in any person." *Id.* at § 50.10(n). This reservation has been upheld by several federal appellate and district courts. *See In re Special Proceedings*, 373 F.3d 37, 44 n.3 (1st Cir. 2004) (noting that DOJ guidelines state that they do not create legally enforceable rights); *In re Grand Jury Subpoena American Broadcasting Companies, Inc.*, 947 F. Supp. 1314, 1322 (D. Ark. 1996) (declining to quash subpoena based on failure to comply with DOJ regulations, on ground that regulations, by their own terms, confer no rights on media witnesses). *See also In re Grand Jury Proceedings No. 92–4*, 42 F.3d 876, 880 (4th Cir. 1994) (holding that special prosecutor's failure to comply with guidelines regarding issuance of subpoenas to attorney, even if applicable, were not enforceable by witness through motion to quash). The guidelines, not required by any constitutional or statutory provision, *see In re Special Proceedings*, 373 F.3d at 44 n.3, exist to guide the Department's exercise of its discretion in determining whether and when to seek the issuance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel. *See In re Shain*, 978 F.2d 850, 853 (4th Cir. 1992) (holding reporters have no right to seek enforcement of DOJ guidelines before being compelled to testify) (citing *United States v. Caceres*, 440 U.S.

741 (1979) (exclusionary rule not applicable to evidence obtained in violation of internal IRS regulations governing electronic surveillance)); *In re Grand Jury Proceedings No. 92–4*, 42 F.3d at 880 (following *In re Shain*, 978 F.2d at 854).

Appellants rely on *Morton v. Ruiz*, 415 U.S. 199 (1974). In that case, the Supreme Court stated that "where the rights of individuals are affected, it is incumbent upon agencies to follow their own procedures. This is so even where the internal procedures are possibly more rigorous than otherwise would be required." *Id.* at 235.

Ruiz, however, is distinguishable. Regulations considered by the Court in that case required the publication of directives that "inform the public of privileges and benefits available and of eligibility requirements." *Id.* (quotation marks omitted). The Supreme Court found that the publication requirement was intended to benefit potential beneficiaries and therefore invalidated a Bureau of Indian Affairs attempt to limit general assistance benefits to otherwise eligible beneficiaries based on an unpublished eligibility requirement. This reasoning has no applicability to the guidelines before us.

It is well established that the exercise of prosecutorial discretion is at the very core of the executive function. Courts consistently hesitate to attempt a review of the executive's exercise of that function. *See, e.g., United States v. Armstrong*, 517 U.S. 456, 464–65 (1996). Federal prosecutors have "broad discretion to enforce the Nation's criminal laws." *Id.* at 464 (internal punctuation and citations omitted). The prosecutor's discretion arises from their designation "as the President's delegates to help him discharge his constitutional responsibility to 'take care that the laws be faithfully executed.' " *Id.* (quoting U.S. CONST. art. II, § 3). Given the nature of the guidelines themselves, and the function they govern, we conclude that the guidelines provide no enforceable rights to any individuals, but merely guide the discretion of the prosecutors. We therefore need not reach the question of the Special Counsel's compliance with the guidelines, and again we affirm the decision of the District Court.

III. Conclusion

For the reasons set forth above, the judgment of the District Court is affirmed.

SENTELLE, *Circuit Judge, concurring:* As noted in the opinion of the court, I write separately to express my differing basis for affirming the District Court on the common law privilege issue. I would hold that reporters refusing to testify before grand juries as to their "confidential sources" enjoy no common law privilege beyond the protection against harassing grand juries conducting groundless investigations that is available to all other citizens. While I understand, and do not actually disagree with, the conclusion of my colleagues that any such privilege enjoyed by the reporters has been overcome by the showing of the United States, and that we therefore need not determine whether such privilege exists, I find this ordering of issues a bit disturbing. To me, the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it. While I understand Judge Henderson's theory that she cannot support a privilege afforded by the common law which would not be overcome by the quantum of proof offered by the government, I think it more logical to not reach the quantum question in the absence of a determination as to the existence of the privilege than to proceed the other way around.[1] That said, I fully join the conclusion that we should affirm the District Court's decision to hold the appellants in contempt, unswayed by their claim of protection of common law privilege. I write separately only to explain my reasons for rejecting the theory that such a privilege is known to the common law.

I base my rejection of the common law privilege theory on foundations of precedent, policy, and separation of powers. As

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[1] See Opinion of Judge Tatel at pp. 5-9.

to precedent, I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), to be as dispositive of the question of common law privilege as it is of a First Amendment privilege. While *Branzburg* generally is cited for its constitutional implications, the *Branzburg* Court repeatedly discussed the privilege question in common law terms as well as constitutional. Indeed, the majority opinion by Justice White includes the phrase "common law" no fewer than eight times. More significant than the fact that the Court frequently spoke of the common law is what the Court had to say about it: "at common law, courts consistently refuse to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury." *Id.* at 685 (collecting cases).

At page 688, the Court continued, "although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, *common law*, or statutory privilege . . . is particularly applicable to grand jury proceedings." (emphasis added) (citations omitted). Significantly, the Court made this statement in the course of holding the journalists litigating before it unprotected by privilege against contempt citations. Granted, the Court expressly held that it was not about to create a new "constitutional" privilege. But in the same paragraph with that rejection it expressly discusses the possible protection of common law and in the end reaches a result that leaves the reporters unprotected. I think it therefore indisputable that the High Court rejected a common law privilege in the same breath as its rejection of such a privilege based on the First Amendment. Especially is this so when we consider that it makes little sense to assume that the Court first reached out to take a constitutional question it would not have needed to answer had there been such a common law privilege, and then proceeded to answer that question in such a fashion as to reach

a result upholding contempt citations and reversing vacation of such citations.[2]

Because the Supreme Court rejected the common law privilege, I think it would be at least presumptuous if not overreaching for us to now adopt the privilege. As the opinion of the court notes, "the Supreme Court has told us:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the court of appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."

Maj. Op. at 16 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 484 (1989)).

The Supreme Court has rejected a common law privilege for reporters subpoenaed to give evidence to grand juries. In my view that rejection stands unless and until the Supreme Court itself overrules that part of *Branzburg*. Although the appellants argue that other changes in the law since *Branzburg* should lead to an opposite result, I think that argument should appropriately be made to the Supreme Court, not the lower courts.[3]

Even if appellants are correct that we would have the power to adopt such a privilege in the face of the *Branzburg* precedent, I nonetheless would not accept that invitation. Appellants' argu-

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[2] By way of comparison, under the constitutional avoidance doctrine, the Supreme Court counsels courts "to adopt constructions of statutes to 'avoid decision of constitutional questions,' not to deliberately create constitutional questions." *See, e.g., McConnell v. Federal Election Commission*, 540 U.S. 93, 180 (2003); *United States v. 37 Photographs*, 402 U.S. 363, 373 (1971), *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 407 (1909); *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring).

[3] I wish to make it plain that I do not fault the appellants for making the argument, understanding that they must if they wish to preserve it for Supreme Court review. Nonetheless, I think it is only the High Court and not this one that may act upon that argument.

ment for our authority to adopt the new privilege begins with the Federal Rules of Evidence. Rule 501, enacted by Congress in the Federal Rules of Evidence in 1975, three years after *Branzburg*, rejected an enumeration of specific federal privileges and provided that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience." Although the rules became effective after *Branzburg*, Rule 501 does not effect any change in the authority of federal courts to adopt evidentiary privileges. Before the enactment of the Federal Rules of Evidence, the authority of the federal courts to adopt common law privileges was governed by case law. The relevant case law provided for precisely the same authority as Congress enacted in the rules. Indeed, the language of the rule is drawn directly from case law governing at the time of *Branzburg*. The Supreme Court expressly held in *Wolfle v. United States*, 291 U.S. 7 (1934), that

> the rules governing the competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules enforced at the time of the admission into the union of the particular state where the trial takes place, but are *governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.*

291 U.S. 7, 12 (1934) (citing *Funk v. United States*, 290 U.S. 371 (1933)) (emphasis added). Given the venerable origins of the language used in Rule 501, it cannot be said that the courts have more power to adopt privileges today than at the time of *Branzburg*. The power is precisely the same. Thus, the enactment of Rule 501 cannot by itself work any change in the law which should empower us to depart from the Supreme Court's clear precedent in *Branzburg*.

Appellants persist, however, that the state of the common law has changed sufficiently to warrant a new approach. By appellants' count, at the time of the *Branzburg* decision,

only seventeen states had enacted what appellants refer to as "shield laws" to protect journalists from forced disclosure of confidential sources or newsgathering materials, while today, thirty–one states (plus the District of Columbia) have such statutes.[4] Nonetheless, I think it remains the prerogative of the Supreme Court rather than inferior federal tribunals to determine whether these changes are sufficient to warrant an overruling of the Court's rejection of such a common law privilege in *Branzburg*.

Furthermore, even if we are authorized to make that decision, reasons of policy and separation of powers counsel against our exercising that authority. While I concede that the adoption of the "shield" by legislation rather than judicial fiat does not prevent the change being considered by the courts in assessing the common law, I find the adoption of the privilege by the legislatures of the states instructive as to how the federal government should proceed, if at all, to adopt the privilege. The statutes differ greatly as to the scope of the privilege, and as to the identity of persons entitled to the protection of the privilege.

We have alluded in the majority opinion to the differing decisions of courts as to civil, criminal, and grand jury proceedings. There is also a more fundamental policy question involved in the crafting of such a privilege.

The Supreme Court itself in *Branzburg* noted the difficult and vexing nature of this question, observing that applying such privilege would make it

> necessary to define those categories of newsmen who qualify for the privilege, a questionable procedure in light of

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[4] The fact that the adoption has been by legislation rather than court decision does not deprive the change in law of common law force. As the Supreme Court has noted, "the policy decisions of the states bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one[,]" and further has told us that "it is of no consequence that recognition of the privilege in the vast majority of the states is the product of legislative action rather than judicial decision." *Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).

> the traditional doctrine that liberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods.

408 U.S. at 704. The Supreme Court went on to observe that "freedom of the press is a 'fundamental personal right . . . not confined to newspapers and periodicals. It necessarily embraces pamphlets and leaflets . . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.' " *Id.* (quoting *Lovell v. Griffin*, 304 U.S. 444, 450, 452 (1938)). Are we then to create a privilege that protects only those reporters employed by Time Magazine, the New York Times, and other media giants, or do we extend that protection as well to the owner of a desktop printer producing a weekly news-letter to inform his neighbors, lodge brothers, co–religionists, or co–conspirators? Perhaps more to the point today, does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not? How could one draw a distinction consistent with the court's vision of a broadly granted personal right? If so, then would it not be possible for a government official wishing to engage in the sort of unlawful leaking under investigation in the present controversy to call a trusted friend or a political ally, advise him to set up a web log (which I understand takes about three minutes) and then leak to him under a promise of confidentiality the information which the law forbids the official to disclose?

The state legislatures have dealt with this vexing question of entitlement to the privilege in a variety of ways. Some are quite restrictive. Alabama limits its protection to "person[s] engaged in, connected with, or employed on any newspaper, radio broadcasting station or television station, while engaged in a news-gathering capacity." ALA. CODE § 12–21–142. Alaska's statutes protect only the "reporter," a category limited to "person[s] reg-

ularly engaged in the business of collecting or writing news for publication or presentation to the public, through a news organization." ALASKA STAT. § 09.25.300. The statutory privilege in Arizona protects "a person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper or radio or television station . . . ." ARIZ. REV. STAT. § 12–2237. Arkansas's legislature has declared the privilege applicable to "any editor, reporter, or other writer for any newspaper, periodical, or radio station, or publisher of any newspaper or periodical, or manager or owner of any radio station . . . ." ARK. CODE ANN. § 16–85–510. Delaware is perhaps the most specific, protecting a "reporter," which

> means any journalist, scholar, educator, polemicist, or other individual who either: (a) At the time he or she obtained the information that is sought was earning his or her principal livelihood by, or in each of the preceding 3 weeks or 4 of the preceding 8 weeks had spent at least 20 hours engaged in the practice of, obtaining or preparing information for dissemination with the aid of facilities for the mass reproduction of words, sounds, or images in a form available to the general public; or (b) Obtained the information that is sought while serving in the capacity of an agent, assistant, employee, or supervisor of an individual who qualifies as a reporter under subparagraph a.

DEL. CODE ANN. tit. 10 § 4320. Presumably, states such as these would provide the privilege only to the "established" press.

Others are quite inclusive. The Nebraska legislature, for example, has declared:

> (1) That the policy of the State of Nebraska is to insure the free flow of news and other information to the public, and that those who gather, write, or edit information for the public or disseminate information to the public may perform these vital functions only in a free and unfettered atmosphere; (2) That such persons shall not be inhibited,

> directly or indirectly, by governmental restraint or sanction imposed by governmental process, but rather that they shall be encouraged to gather, write, edit, or disseminate news or other information vigorously so that the public may be fully informed.

NEB. REV. STAT. § 20–144. To that end, it protects any "medium of communication" which term "shall include, *but not be limited to*, any newspaper, magazine, other periodical, book, pamphlet, news service, wire service, news or feature syndicate, broadcast station or network, or cable television system." *Id.* at § 20145(2) (emphasis added).

In defining the persons protected by that privilege, Nebraska tells us that "Person shall mean any individual, partnership, limited liability company, corporation, association, or other legal entity existing under or authorized by the law of the United States, any state or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any foreign country." *Id.* at 20–145(7). Presumably, then, Nebraska, perhaps more in keeping with the spirit of the recent revolutionaries who gave us the First Amendment, protects the pamphleteer at the rented printer, and the blogger at the PC, as well as the giant corporation with its New York publishing house.

The variety of legislative choices among the states only serves to heighten the concern expressed by the majority in *Branzburg*. *See* 408 U.S. at 704. This concern is reinforced by examination of the *Jaffee* decision, upon which appellants rely. In *Jaffee*, the Supreme Court extended a federal privilege "to confidential communications made to licensed social workers in the course of psychotherapy." 518 U.S. at 15. There is little definitional problem with the application of this privilege. The court need only ask: Does this "social worker" have a license? If the answer is "yes," then the privilege applies; if it's "no," the privilege does not. If the courts extend the privilege only to a defined group of reporters, are we in danger of creating a "licensed" or "established" press? If we do so, have we run afoul of the breadth of the freedom of the press, that "funda-

mental personal right" for which the Court in *Branzburg* expressed its concern? 408 U.S. at 704. Conversely, if we extend that privilege to the easily created blog, or the ill–defined pamphleteer, have we defeated legitimate investigative ends of grand juries in cases like the leak of intelligence involved in the present investigation?

Nor does the identity of the protected persons constitute the only difficult policy decision. *Branzburg* enumerates several concerns. For example, does "the public interest and possible future news about crime from undisclosed, unverified sources . . . take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future"? *Id.* at 695. Do "agreements to conceal information relevant to the commission of crime avail little to recommend them from the standpoint of public policy"? *Id.* at 696. What are we to do with the historic common law recognition of "a duty to raise the 'hue and cry' and report felonies to the authorities"? *Id.* (*see also* authorities collected in *id.* at 696 n.34). Should we be creating immunity from prosecution for "misprision" of a felony—that is, the concealment of a felony? *Id.* at 696.

Should the privilege be absolute or limited? If limited, how limited? Without attempting to catalog, I note that the state statutes provide a variety of answers to that policy question. Therefore, if such a decision requires the resolution of so many difficult policy questions, many of them beyond the normal compass of a single case or controversy such as those with which the courts regularly deal, doesn't that decision smack of legislation more than adjudication? Here, I think the experience of the states is most instructive. The creation of a reporter's privilege, if it is to be done at all, looks more like a legislative than an adjudicative decision. I suggest that the media as a whole, or at least those elements of the media concerned about this privilege, would better address those concerns to the Article I legislative branch for presentment to the Article II executive than to the Article III courts.

For all the reasons set forth above, I would hold that there is no common law privilege protecting reporters or any other news media personnel, no matter how defined, from the reach of grand jury subpoenas on claim of confidentiality.

HENDERSON, *Circuit Judge*, *concurring:* I write separately to emphasize that adherence to the principle of judicial restraint—patience in judicial decision–making— would produce a better result in I.B of the majority opinion. Because my colleagues and I agree that any federal common–law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not, and therefore should not, decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common–law reporter's privilege may erect.

In our circuit it is a venerable practice, and one frequently observed, to assume *arguendo* the answer to one question—*e.g.*, whether to recognize a federal common– law reporter's privilege—in order to resolve a given case by answering another and equally dispositive one—*e.g.*, whether *any* privilege would protect these reporters.[1] Although both of my colleagues question

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[1] *See, e.g., Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP,* 124 F.3d 1304, 1308 (D.C. Cir. 1997) (because appellant failed to show sufficient need for attorney interview notes, court "save[d] for another day" "difficult matters" of determining "degree of selection necessary to transform facts into opinions and the standard of review we should employ of a district court determination" regarding discovery of attorney work product); *Littlewolf v. Lujan,* 877 F.2d 1058, 1065 (D.C. Cir. 1989) ("find[ing] it unnecessary to address the difficult questions raised by appellants regarding the Due Process adequacy of the period provided by the Act" because "[e]ven if we assume *arguendo* that the six-month limitations period is unreasonably short and that, as a consequence, the Act effectively 'takes' the Band members' property rights, we conclude that the statute provides the Indians with just compensation"); *cf*

the logic of this approach here, it is a mode of decision–making they themselves have often used.[2] In this case, however, they

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Michel v. INS, 206 F.3d 253, 260 n.4 (2d Cir. 2000) ("Where . . . no harm results from our failing to answer a question, we believe that the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available.' " (quoting *Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in judgment))).

[2] *See, e.g., Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002) (Sentelle, J.) (assuming union organizer's activity constituted "concerted activity" under 29 U.S.C. § 157 but holding it was not protected under statute); *Jackson v. Dist. of Columbia*, 254 F.3d 262, 265 (D.C. Cir. 2001) (Tatel, J.) ("continu[ing]" assumption that Religious Freedom Restoration Act applies to federal government and holding prisoners failed to exhaust administrative remedies); *Carney v. Am. Univ.*, 151 F.3d 1090,1094-95 (D.C. Cir. 1998) (Tatel, J.) (assuming without deciding retaliation violates 42 U.S.C. § 1981 and remanding claim for trial); *Massachusetts v. United States Dep't of Transp.*, 93 F.3d 890, 892 (D.C. Cir. 1996) (Sentelle, J.) ("We need not determine whether an agency's interpretation of a statute on the preemption question is subject to *Chevron* analysis in order to decide this case, as the agency's determination here cannot be upheld with or without deference.").

Judge Tatel distinguishes these cases by concluding that their analysis cannot be used to avoid the "dispositive" issue in this case. Tatel Slip Op. at 8. There are, however, only three ways of answering the question whether these reporters' confidential source information is protected by a federal common-law privilege: (1) there is no privilege, (2) there is an absolute privilege and (3) there is a qualified privilege. None of us, including the reporters in their brief, would choose door number two, *see* Tatel Slip Op. at 19; Appellants' Br. at 42, and only one of us heads for door number one, *see* Sentelle Slip Op. at 1. That leaves door number three. But in choosing this route, the critical question is not definitional, as Judge Tatel sees it, *see* Tatel Slip Op. at 8, but quantitative: Is the Special Counsel's evidentiary proffer *sufficient* to overcome *any* qualified privilege that may exist? Because we agree that the answer is "yes," there is no need for us to go any further. Granted, the circumstances of the cited cases differ but they use the same analysis. Moreover, its application here is consistent with the tried and true principle that "[w]here . . . no harm results from our failing to answer a question, . . . the 'doctrine of judicial restraint provides a fully adequate justification for deciding [the] case

employ two divergent forms of "wide-angle adjudication." *See* Harry T. Edwards, *The Role of the Judge in Modern Society: Some Reflections on Current Practices in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 414 (1983–84). Judge Sentelle would hold that a reporter enjoys no federal common-law privilege to refuse to provide a bona fide grand jury with relevant documents and testimony while Judge Tatel would fix the contours of a qualified reporter's privilege by using a novel multi-factor balancing test only to conclude that it helps these reporters not at all.[3]

While I am convinced that we need not, and therefore should not, go further than to conclude, as did the district court, *see* Appendix 35–36, 275, that the Special Counsel's showing decides the case, I feel compelled to comment briefly on my colleagues' opposing conclusions if only to make clear why I think it unwise to advance either of them. I cannot agree with Judge Sentelle's conclusion that the United States Supreme Court has answered the question we now avoid. *Branzburg v. Hayes* addressed only "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the *First Amendment*"

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on the best and narrowest ground available.' " *Michel*, 206 F.3d at 260 n.4 (quoting *Air Courier Conference of Am.*, 498 U.S. at 531 (Stevens, J. concurring in judgment)); *see supra* note 2.

[3] Judge Tatel maintains that "[for the sake of reporters and sources," we must establish the contours of a privilege in order to "clarify the rules governing their relationship." Tatel Slip Op. at 9. But the press's collection of information, including from confidential sources, seems to me near impervious to regulation: "[E]xperience teaches us more than sufficiently that men have nothing less in their power than their tongue . . . ." BENEDICT DE SPINOZA, ETHICS 168 (G.H.R. Parkinson ed. & trans., Oxford Univ. Press 2000); *cf.* STANLEY WALKER, CITY EDITOR 44 (Johns Hopkins Univ. Press 1999) (1934) ("Women, wampum, and wrongdoing are always news."). As the *Branzburg* Court recognized, "the relationship of many informants to the press is a symbiotic one which is unlikely to be greatly inhibited by the threat of subpoena." 408 U.S. 665, 694 (1972).

and "h[e]ld that *it* does not." 408 U.S. 665, 667 (1972) (emphases added). The boundaries of constitutional law and common law do not necessarily coincide, however, and while we are unquestionably bound by *Branzburg's* rejection of a reporter's privilege rooted in the First Amendment, we are not bound by *Branzburg's* commentary on the state of the common law in 1972. Federal Rule of Evidence 501, which came into being nearly three years after *Branzburg*, authorizes federal courts to develop testimonial privileges "in the light of reason and experience," allowing for the often evolving state of the common law. *See* FED. R EVID. 501; *Trammel v. United States*, 445 U.S. 40, 47 (1980) ("In rejecting the proposed Rules and enacting Rule 501, Congress manifested an affirmative intention not to freeze the law of privilege."); *see id.* ("The Federal Rules of Evidence acknowledge the authority of the federal courts to continue the evolutionary development of testimonial privileges."). Judge Sentelle's view also discounts the fact that, even as they rejected a reporter's First Amendment right to withhold testimony from a bona fide grand jury, both the *Branzburg* majority opinion as well as Justice Powell's separate concurrence hint ambiguously at the existence of some special protection for reporters stemming from their significant role in sustaining our republican form of government.[4]

At the same time, I am far less eager a federal common–law pioneer than Judge Tatel as I find less comfort than he in riding

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[4] *See Branzburg*, 408 U.S. at 708 ("[N]ews gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment."); *id.* at *710* ("The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.") (Powell, J., concurring); *see also In re Grand Jury*, 955 F.2d 229, 434 (4th Cir. 19+92) (noting *Branzburg's* observation that First Amendment protects reporter in grand jury proceedings initiated or conducted in bad faith presents a "paradox" because "district courts can control prosecutorial abuse in any setting, not just in cases involving the First Amendment").

Jaffee v. Redmond, 518 U.S. 1 (1996), into the testimonial privilege frontier. Just as Rule 501 imposes no "freeze" on the development of the common law, *see Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990); *Trammel*, 445 U.S. at 47, it likewise does not authorize federal courts to mint testimonial privileges for any group—including the "journalistic class," as Judge Sentelle dubs it, Maj. Slip Op. at 15—that demands one. The Supreme Court has warned that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v. Nixon*, 418 U.S. 683, 710 (1974); *see Branzburg*, 408 U.S. at 690; *see also Jaffee*, 518 U.S. at 21 (Scalia, J., dissenting). Accordingly, we should proceed as cautiously as possible "when erecting barriers between us and the truth," *id.*, recognizing that the Legislature remains the more appropriate institution to reconcile the competing interests–prosecuting criminal acts versus constricting the flow of information to the public–that inform any reporter's privilege to withhold relevant information from a bona fide grand jury. *See Univ. of Penn.*, 493 U.S. at 189.

Because *Jaffee* sits rather awkwardly within a jurisprudence marked by a fairly uniform disinclination to announce new privileges[5] or even expand existing ones,[6] and even though it enjoyed the support of an overwhelming majority, I am hesitant to apply its methodology to a case that does not require us to do so. While it would not be the first of its kind, *see Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*"Lemon* test"); *cf. Elk Grove Unified Sch. Dist. v. Newdow*, ___ U.S. ___, 124 S. Ct. 2301,

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[5] *See Univ. of Penn.*, 493 U.S. 182 (rejecting privilege protecting academic peer-review materials); *United States v. Gillock*, 445 U.S. 360 (1980) (rejecting privilege protecting "legislative acts"); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

[6] *See United States v. Zolin*, 491 U.S. 554 (1989) (permitting *in camera* review of materials to establish applicability of crime-fraud exception to attorney-client privilege); *Trammel v. United States*, 445 U.S. 40 (1980) (witness spouse's voluntary testimony not covered by spousal privilege); *see also Jaffee*, 518 U.S. at 18-36 (Scalia, J., dissenting).

2327 n.1 (2004) ("We have selectively invoked particular tests, such as the '*Lemon* test,' with predictable outcomes." (internal citation omitted)) (Thomas, J., concurring in judgment), the type of multi–factor balancing test Judge Tatel proposes seems, at least to me, to lack analytical rigor because its application to this case is foreordained. Indeed, I am not convinced that a balancing test that requires more than an evaluation of the essentiality of the information to the prosecution and the exhaustion of available alternative sources thereof is either useful or appropriate. While Judge Tatel makes the centerpiece of his test the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," *see* Tatel Slip Op. at 21, this court (in the civil context),[7] the United States Department of Justice[8] and the lone district court

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[7] *Zerilli v. Smith*, 656 F.2d 705, 713-714 (D.C. Cir. 1981); *Carey v. Hume*, 492 F.2d 631, 636-38 (D.C. Cir. 1972); *cf United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (affirming district court's conclusion that reporter's privilege was not overcome because his testimony was not "'essential or crucial' " to defendant's case or relevant to determination of guilt or innocence).

[8] *See* 28 C.F.R. § 50.10. As Judge Tatel points out, *see* Tatel Slip Op. at 20, the Justice Department regulations aim to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice," *see id.* § 50.10(a), but the regulations do not balance the two interests. They establish instead that, in requesting authorization to subpoena a member of the press, the government should: reasonably believe that, in a criminal case, the information sought is essential "to a successful investigation–particularly with reference to directly establishing guilt or innocence," *see id.* § 50.10(f)(1); attempt unsuccessfully to obtain the information from "alternative nonmedia sources," *see id.* § 50.10(f)(3); seek only to verify, "except under exigent circumstances," published information and "such surrounding circumstances as relate to the accuracy of the published information," *see id.* § 50.10(f)(4); treat "[e]ven" requests for publicly disclosed information "with care to avoid claims of harassment," *see id.* § 50.10(f)(5); and, "wherever possible," seek material information on a limited subject mat-

that has recognized a federal common–law reporter's privilege in the grand jury context[9] have declined to consider either of these factors in deciding whether to recognize a reporter's exemption from compulsory process.[10] There is a good reason for this. I suspect that balancing "harm" against "news value" may prove unproductive because in most of the projected scenarios–leaks of information involving, for example, military operations, national security, policy choices or political adversaries–the two interests overlap. Furthermore, *Branzburg* warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes. *See* 408 U.S. at 706 ("By requiring testimony from a reporter in investigations involving some crimes but not in others, [the courts] would be making a value judgment that a legislature had declined to make, since in each case the criminal law involved would represent a considered legislative judgment, not constitutionally suspect, of what conduct is liable to criminal prosecution. The task of judges, like other officials outside the legislative branch, is not to make the law but to uphold it in accordance with their oaths."). And any evaluation of the importance of newsgathering keyed to its perceived "benefit" to the public, Tatel Slip Op. at 20; *see id.* at 27 ("beneficial newsgathering"), seems antithetical to our nation's abiding commitment to the uninhibited trade in ideas.

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ter and for a limited time period, avoid requiring the production of large quantities of unpublished material and "give reasonable and timely notice of the demand for documents," *see id.* § 50.10(f)(6).

[9] *See In re Williams*, 766 F. Supp. 358, 368-70 (W.D. Pa. 1991), *aff'd by equally divided court*, 963 F.2d 567 (3d Cir. 1992) (en banc) (order without treatment of merits).

[10] Judge Tatel insists that his test is not "novel . . . , considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines." *See* Tatel Slip Op. at 22. But the central factors of his test-the balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value," Tatel Slip Op. at 21-find no support that I can detect in those cases. *See* 28 C.F.R. § 50.10; *Zerilli*, 656 F.2d at 713-714; *Carey*, 492 F.2d at 636-38.

See, e.g., Riley v. Nat'l Fed'n of Blind, Inc., 487 U.S. 781, 790–91 (1988) ("The First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *Cohen v. California*, 403 U.S. 15, 24 (1971) ("The constitutional right of free expression is . . . designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us."); *McConnell v. FEC*, 251 F. Supp. 2d 176, 360 (D.D.C. 2003) ("[T]he First Amendment delegates to the populace at large the responsibility of conducting an 'uninhibited, robust, and wide– open' debate." (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964))); *cf. Gertz v. Welch, Inc.*, 418 U.S. 323, 346 (1974). Moreover, to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice. On this score, Judge Tatel levels the identical charge against my approach, *see* Tatel Slip Op. at 8, but I fail to see how declining to decide whether a reporter's privilege exists or to define its contours could confine a future panel.

For the foregoing reasons, I am convinced that the court would chart the best course by charting the narrowest one and, accordingly, concur only in the judgment with respect to II.B of the majority opinion. In all other respects, I fully concur.

TATEL, *Circuit Judge*, concurring in the judgment: This case involves a clash between two truth–seeking institutions: the grand jury and the press. On the one hand, the grand jury, a body "deeply rooted in Anglo– American history" and guaranteed by the Fifth Amendment, *see United States v. Calandra*, 414 U.S. 338, 342–43 (1974), holds "broad powers" to collect evidence through judicially enforceable subpoenas. *See United States v. Sells Eng'g, Inc.*, 463 U.S. 418, 423–24 (1983). "Without thorough and effective investigation, the grand jury would

be unable either to ferret out crimes deserving of prosecution, or to screen out charges not warranting prosecution." *Id.* at 424. On the other hand, the press, shielded by the First Amendment, "has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965). Using language we have quoted with approval, *see Carey v. Hume*, 492 F.2d 631, 634–35 (D.C. Cir. 1974), the Second Circuit aptly described this conflict between press freedom and the rule of law: "Freedom of the press, hard–won over the centuries by men of courage, is basic to a free society. But basic too are courts of justice, armed with the power to discover truth. The concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press." *Garland v. Torre*, 259 F.2d 545, 548 (2d Cir. 1958).

Because I agree that the balance in this case, which involves the alleged exposure of a covert agent, favors compelling the reporters' testimony, I join the judgment of the court. I write separately, however, because I find *Branzburg v. Hayes*, 408 U.S. 665 (1972), more ambiguous than do my colleagues and because I believe that the consensus of forty–nine states plus the District of Columbia– and even the Department of Justice– would require us to protect reporters' sources as a matter of federal common law were the leak at issue either less harmful or more newsworthy.

I.

Although I join the court's rejection of appellants' First Amendment argument, I am uncertain that *Branzburg* offers "no support" for a constitutional reporter privilege in the grand jury context. *See* majority op. at 12–13. To be sure, *Branzburg* upheld the enforcement of subpoenas seeking confidential source information, including notes and testimony about inter-

views and observations at a militant group's headquarters. *See* 408 U.S. at 672–77. Yet even the *Branzburg* majority declared that "news gathering is not without its First Amendment protections," *Id.* at 707, a phrase we have interpreted (albeit in dictum) to "indicate[ ] that a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify," *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981). *Branzburg's* caveat, placed in a discussion of "[o]fficial harassment of the press" and "grand jury investigations . . . instituted or conducted other than in good faith," *Branzburg*, 408 U.S. at 707–08, seems to refer only to journalists' power to quash "unreasonable or oppressive" subpoenas, *see* Fed. R. Crim. P. 17(c)(2). But given that any witness journalist or otherwise–may challenge such a subpoena, the majority must have meant, at the very least, that the First Amendment demands a broader notion of "harassment" for journalists than for other witnesses. Reinforcing that view, the majority added, "We do not expect courts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth." *Branzburg*, 408 U.S. at 708. That prediction, too, would appear meaningless if no First Amendment safeguards existed for subpoenaed reporters.

Then there is Justice Powell's "enigmatic concurring opinion." *Id.* at 725 (Stewart, J., dissenting). Though providing the majority's essential fifth vote, he wrote separately to outline a "case–by–case" approach, *see id.* at 710 (Powell, J., concurring), that fits uncomfortably, to say the least, with the majority's categorical rejection of the reporters' claims. Emphasizing "the limited nature of the Court's holding," *id.* at 709, he wrote:

> The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital constitutional and societal interests on a case–by–case basis accords with the tried and traditional way of adjudicating such questions.

Id. at 710. "In short," Justice Powell concluded, "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection." *Id.* Even more than the majority opinion, this language places limits on grand jury authority to demand information about source identities–though, again, the precise extent of those limits seems unclear.

Given *Branzburg's* internal confusion and the "obvious First Amendment problems" involved in "[c]ompelling a reporter to disclose the identity of a confidential source," *Zerilli*, 656 F.2d at 710, it is hardly surprising that lower courts have, as Chief Judge Hogan put it, "chipped away at the holding of *Branzburg*," finding constitutional protections for reporters in "various factual scenarios different than those presented in *Branzburg*." *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 31 (D.D.C. 2004). We ourselves have affirmed the denial of a criminal defense subpoena on grounds that the defendant "failed to carry his burden" of "demonstrat[ing] that the reporters' qualified privilege should be overcome." *United States v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000). In civil litigation, moreover, we have held that the First Amendment requires courts to "look to the facts on a case–by–case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired." *Carey*, 492 F.2d at 636; *see also Zerilli*, 656 F.2d at 707 (affirming the denial of a motion to compel discovery because "in this case the First Amendment interest in protecting a news reporter's sources outweighs the interest in compelled disclosure"). Other circuits have reached similar conclusions. *See, e.g., United States v. LaRouche Campaign*, 841 F.2d 1176, 1180–81 (1st Cir. 1988) (acknowledging First Amendment limits on criminal defense subpoenas directed at news organizations); *United States v. Burke*, 700 F.2d 70, 76–77 (2d Cir. 1983) (extending a First Amendment reporter privilege developed in civil cases to a criminal defense subpoena); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 593–99

(1st Cir. 1980) (describing First Amendment limits on discovery of reporters' sources in civil litigation); *Silkwood v. Kerr–McGee Corp.*, 563 F.2d 433, 436–37 (10th Cir. 1977) (indicating that a qualified newsgathering privilege "is no longer in doubt"); *but see In re Grand Jury Proceedings*, 810 F.2d 580, 584–85 (6th Cir. 1987) (rejecting claims of First Amendment privilege in grand jury proceedings).

In this case, however, our hands are tied for two independent reasons. First, although this circuit has limited *Branzburg* in other contexts, *see Zerilli*, 656 F.2d at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, with respect to criminal investigations we have twice construed that decision broadly. In *Reporters Committee for Freedom of the Press v. AT&T*, 593 F.2d 1030 (D.C. Cir. 1978), which addressed a First Amendment challenge regarding access to journalists' phone records and describing *Branzburg* as foreclosing "case–by–case consideration," we declared, "Good faith investigation interests *always* override a journalist's interest in protecting his source." *Id.* at 1049 (emphasis added). Echoing this broad view, we have also described *Branzburg* as "squarely reject[ing]" a claim to "general immunity, qualified or otherwise, from grand jury questioning." *See In re Possible Violations of 18 U.S.C. 371*, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977). In this circuit, then, absent any indication of bad faith, I see no grounds for a First Amendment challenge to the subpoenas at issue here.

Second, although *Branzburg* involved militants and drug dealers rather than government leakers, the factual parallels between that case and this one preclude us from quashing the subpoenas on constitutional grounds. *See* majority op. at 10. If, as *Branzburg* concludes, the First Amendment permits compulsion of reporters' testimony about individuals manufacturing drugs or plotting against the government, *see* 408 U.S. at 667–69, 675–77, all information the government could have obtained from an undercover investigation of its own, the case for a constitutional privilege appears weak indeed with respect to leaks, which in all likelihood will be extremely difficult to

prove without the reporter's aid. Thus, if *Branzburg* is to be limited or distinguished in the circumstances of this case, we must leave that task to the Supreme Court.

II.

But *Branzburg* is not the end of the story. In 1975– three years after *Branzburg–Congress* enacted Rule 501 of the Federal Rules of Evidence, authorizing federal courts to develop evidentiary privileges in federal question cases according to "the principles of the common law as they may be interpreted . . . in the light of reason and experience." Fed. R. Evid. 501; *see also* Pub. L. No. 93–595, 88 Stat. 1926 (1975). Given *Branzburg's* instruction that "Congress has freedom to determine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, Rule 501's delegation of congressional authority requires that we look anew at the "necess[ity] and desirab[ility]" of the reporter privilege–though from a common law perspective.

Under Rule 501, that common lawmaking obligation exists whether or not, absent the rule's delegation, Congress would be "the more appropriate institution to reconcile the competing interests . . . that inform any reporter's privilege to withhold relevant information from a bona fide grand jury." Sep. op. at 5 (Henderson, J., concurring) (citing *Univ. of Pa. v. EEOC*, 493 U.S. 182, 189 (1990)); *but see* sep. op. at 4–5 (Sentelle, J., concurring) (observing that even before Rule 501, case law provided federal courts with "precisely the same authority" to recognize common law privileges) (citing *Wolfle v. United States*, 291 U.S. 7, 12 (1934)); *Univ. of Pa.*, 493 U.S. at 189 (declining to recognize a privilege "where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself"). As the Supreme Court has explained, "Rule 501 was adopted precisely because Congress wished to leave privilege questions to the courts rather

than attempt to codify them." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 803 n.25 (1984). Thus, subject of course to congressional override, we must assess the arguments for and against the claimed privilege, just as the Supreme Court has done in cases recognizing common law privileges since 1975. *See, e.g., Jaffee v. Redmond*, 518 U.S. 1, 15 (1996) (psychotherapist–patient); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (attorney–client); *Trammel v. United States*, 445 U.S. 40, 51 (1980) (confidential marital communications).

In this case, just as *Jaffee v. Redmond* recognized a common law psychotherapist privilege based on "the uniform judgment of the States," 518 U.S. at 14, I believe that "reason and experience" dictate a privilege for reporters' confidential sources–albeit a qualified one. Guided by *Jaffee's* reasoning, I reach this conclusion by considering first whether "reason and experience" justify recognizing a privilege at all, and if so whether the privilege should be qualified or absolute and whether it should cover the communications at issue in this case.

Before undertaking that analysis, I think it helpful to explain why, in my view, we should not, as would Judge Henderson, short–circuit *Jaffee's* framework and decide whether the special counsel may overcome the reporter privilege without ever reaching the issue of whether the privilege in fact exists. *See* sep. op. at 1 (Henderson, J., concurring). Unless we conclude, as does Judge Sentelle, *see* sep. op. at 1 (Sentelle, J., concurring), and as did the district court, *see In re Special Counsel Investigation*, 338 F. Supp. 2d 16,18–19 (D.D.C. 2004), that no privilege exists, we cannot resolve this case without adopting *some* standard. Judge Henderson criticizes my approach, but she never indicates what standard she would apply, except to state that "the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common law reporter's privilege may erect." *See* sep. op. at 1 (Henderson, J., concurring). To reach even that conclusion, however, one must explain why federal common law cannot support any higher "hurdle," such as an absolute privilege for source identities, which exists in the

District of Columbia and several states, *see*, *e.g.*, D.C. Code Ann. §§ 16–4702, 164703(b); 42 Pa. Cons. Stat. § 5942; Ala. Code § 12–21–142, or a privilege that applies unless non–disclosure "will cause a miscarriage of justice," N.D. Cent. Code § 3 1–01–06.2; *see also* Minn. Stat. § 595.024; N.M. Stat. Ann. § 38–6–7. Without ruling out all such plausible alternatives that would allow the reporters to prevail, how could one know that they cannot prevail here? And withOut selecting some other test based on *Jaffee* and Rule 501, how could one know that no such alternatives are plausible?

Because the *Jaffee* analysis is thus essential to resolving this case (assuming a privilege exists), our frequent practice of avoiding non–essential issues is inapplicable. To be sure, declining to resolve waived issues, *see*, *e.g.*, *Carney v. Am. Univ.*, 151 F.3d 1090, 1094–95 (D.C. Cir. 1998), disposing of procedurally defective claims without reaching the merits, *see*, *e.g.*, *Jackson v. District of Columbia*, 254 F.3d 262, 264, 270–71 (D.C. Cir. 2001); *cf. Massachusetts v. U.S. Dep't of Transp.*, 93 F.3d 890, 891 (D.C. Cir. 1996) (assuming deferential review because even under that standard agency action was unreasonable), and expressing no view on one element of a claim because another element is clearly defective, *see*, *e.g.*, *Tradesmen Int'l, Inc. v. NLRB*, 275 F.3d 1137, 1142 (D.C. Cir. 2002); *Dir., Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304, 1308 (D.C. Cir. 1997); *Littlewolf v. Lujan*, 877 F.2d 1058, 1060 (D.C. Cir. 1989), may well represent "patience in judicial decision–making," sep. op. at 1 (Henderson, J., concurring). Patience, however, cannot justify "declining . . . to define [the disputed privilege's] contours," *see id.* at 9, for that is the dispositive issue in this case.

Accordingly, given that we must apply some test to the government's showing, if we simply assume the privilege exists but our assumption is wrong, then we will have reached out to establish a framework for a non–existent claim—an undertaking hardly consistent with principles of judicial restraint. Indeed, our decision would establish a precedent, potentially binding on

future panels, regarding the scope of the assumed privilege, even though resolving that question was entirely unnecessary. Therefore, I think it imperative to decide as a threshold matter whether the privilege exists, turning only afterwards to the privilege's specific contours.

In this case, moreover, the issue of the privilege's existence is fully briefed, and resolving it definitively will provide critical guidance in similar situations in the future. This is not the only case to raise reporter privilege issues in D.C. federal courts in recent years. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). And given the many leaks that no doubt occur in this city every day, it would be naive to suppose that it will be the last. For the sake of reporters and sources whom such litigation may ensnare, we should take this opportunity to clarify the rules governing their relationship.

Thus, I agree with Judge Sentelle that "the question of the existence of such privilege *vel non* is logically anterior to the quantum of proof necessary to overcome it." Sep. op. at 1 (Sentelle, J., concurring). Without resolving the first question, we cannot and should not decide the second.

Existence of the Privilege

Under *Jaffee*, the common law analysis starts with the interests that call for recognizing a privilege. *See* 518 U.S. at 11. If, as the Supreme Court held there, "[t]he mental health of our citizenry is a public good of transcendent importance," *id.*—one that trumps the "fundamental maxim that the public has a right to every man's evidence," *id.* at 9 (internal quotation marks and ellipsis omitted)–then surely press freedom is no less important, given journalism's vital role in our democracy. Indeed, while the *Jaffee* dissenters questioned psychotherapy's "indispensable role in the maintenance of the citizenry's mental health," *see id.* at 22 (Scalia, J., dissenting), the First Amendment's express protection for "freedom . . . of the press" forecloses any debate

about that institution's "important role in the discussion of public affairs," *Mills v. Alabama*, 384 U.S. 214, 219 (1966). "Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Brown v. Hartlage*, 456 U.S. 45, 52 (1982) (quoting *Mills*, 384 U.S. at 218–19).

Like psychotherapists, as well as attorneys and spouses, all of whom enjoy privileges under Rule 501, *see, e.g., Jaffee*, 518 U.S. at 18 (psychotherapists); *Upjohn Co.*, 449 U.S. at 389 (attorneys); *SEC v. Lavin*, 111 F.3d 921, 925 (D.C. Cir. 1997) (spouses), reporters "depend[ ] upon an atmosphere of confidence and trust," *Jaffee*, 518 U.S. at 10. If litigants and investigators could easily discover journalists' sources, the press's truth–seeking function would be severely impaired. Reporters could reprint government statements, but not ferret out underlying disagreements among officials; they could cover public governmental actions, but would have great difficulty getting potential whistleblowers to talk about government misdeeds; they could report arrest statistics, but not garner firsthand information about the criminal underworld. Such valuable endeavors would be all but impossible, for just as mental patients who fear "embarrassment or disgrace," *id.*, will "surely be chilled" in seeking therapy, *id.* at 12, so will sources who fear identification avoid revealing information that could get them in trouble.

Because of these chilling effects, "[w]ithout a privilege, much of the desirable evidence to which litigants . . . seek access . . . is unlikely to come into being." *Id.* Consequently, as with other privileges, "the likely evidentiary benefit that would result from the denial of the privilege is modest." *Id.* at the same time, although suppression of some leaks is surely desirable (a point to which I shall return), the public harm that would flow from undermining all source relationships would be immense. For example, appellant Judith Miller tells us that her Pulitzer Prize–winning articles on Osama bin Laden's terrorist network

relied on "information received from confidential sources at the highest levels of our government." (Miller Aff. ¶ 10, Appellant's App. at 169.) Likewise, appellant Matthew Cooper maintains that his reports for "*Time's* four million–plus readers about White House policy in Iraq, the chances of passage of major legislation such as Budget and Energy Bills, and the Clinton White House" would have been impossible without confidentiality. (Cooper Aff. ¶ 21, Appellant's App. at 286.) Insofar as such stories exemplify the press's role "as a constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were elected to serve," *Mills*, 384 U.S. at 219, "reason and experience" support protecting newsgathering methods crucial to their genesis. Acknowledging as much in *Zerilli*, we emphasized that "[c]ompelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability" and weaken "a vital source of information," leaving citizens "far less able to make informed political, social, and economic choices." 656 F.2d at 711.

It is true, as the special counsel observes, that apart from affidavits and citations to two articles in their reply brief, the reporters present no empirical evidence that denial of the privilege "will have a significant impact on the free flow of information protected by the First Amendment." Appellee's Br. at 47. But the Supreme Court has never required proponents of a privilege to adduce scientific studies demonstrating the privilege's benefits. Rather, as the *Jaffee* dissenters pointed out, the empirical question—"[h]ow likely is it that a person will be deterred from seeking psychological counseling, or from being completely truthful in the course of such counseling, because of fear of later disclosure in litigation?"—was one "[t]he Court [did] not attempt to answer." 518 U.S. at 22–23 (Scalia, J., dissenting). Instead, following the wise precept that common sense need not be "the mere handmaiden of social science data or expert testimonials," *Amatel v. Reno*, 156 F.3d 192, 199 (D.C. Cir. 1998), *Jaffee* relied on the traditional common law process:

it examined the logical prerequisites of the confidential relationship, taking into account the policy and experience of parallel jurisdictions. *See Jaffee*, 518 U.S. at 10 (reasoning that given the need for "frank and complete disclosure of facts, emotions, memories, and fears" in psychotherapy, "the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment").

Likewise, in *Trammel v. United States*, while justifying the privilege against adverse spousal testimony in terms of "marital harmony," 445 U.S. at 44–45, 53, the Court allowed waiver by the testifying spouse based not on divorce statistics or psychological studies, but rather on the commonsense supposition that "[w]hen one spouse is willing to testify against the other in a criminal proceeding–whatever the motivation–their relationship is almost certainly in disrepair," *Id.* at 52. And in *Swidler & Berlin v. United States*, 524 U.S. 399 (1998), though finding the "empirical information . . . scant and inconclusive," *Id.* at 410, the Court held that the attorney–client privilege survives the client's death because "[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel," *Id.* at 407–a proposition the Court supported with neither evidence nor even citation. Given these decisions, the equally commonsense proposition that reporters' sources will be more candid when promised confidentiality requires no empirical support.

In any event, the special counsel's confidence that exposing sources will have no effect on newsgathering is unjustified. Citing the " 'symbiotic' relationships between journalists and public officials," the special counsel presumes that leaks will go on with or without the privilege. Appellee's Br. at 47 (quoting *Branzburg*, 408 U.S. at 694); *see also* sep. op. at 3 n.3 (Henderson, J., concurring). Not only does this contradict the Justice Department's own guidelines, which expressly recognize that revealing confidential sources can "impair the news gathering function," 28 C.F.R. § 50.10, but the available evidence suggests the special counsel is wrong. As anyone with even a passing

interest in news knows, reporters routinely rely on sources speaking on condition of anonymity—a strong indication that leakers demand such protection. Besides, for all the reasons that lead me to conclude that a privilege exists, reporters and their editors, attorneys, and sources probably believe the same, making it speculative indeed for the special counsel to suppose that dashing that expectation of confidentiality would have no effect on newsgathering.

Turning next, as did *Jaffee*, to the consensus among states, I find support for the privilege at least as strong for journalists as for psychotherapists. Just as in *Jaffee*, where "the fact that all 50 states and the District of Columbia have enacted into law some form of psychotherapist privilege" favored an exercise of federal common lawmaking, *see* 518 U.S. at 12, so here undisputed evidence that forty–nine states plus the District of Columbia offer at least qualified protection to reporters' sources confirms that " 'reason and experience' support recognition of the privilege," *id.* at 13. Indeed, given these state laws, "[d]enial of the federal privilege . . . would frustrate the purposes of the state legislation" by exposing confidences protected under state law to discovery in federal courts. *See id.*

Making the case for a privilege here even stronger than in *Jaffee*, federal authorities also favor recognizing a privilege for reporters' confidential sources. As noted earlier, we ourselves have limited discovery of reporters' sources in both civil and criminal litigation, *see Zerilli*, 656 at 707; *Carey*, 492 F.2d at 636; *Ahn*, 231 F.3d at 37, as have other federal courts, *see, e.g.*, *Bruno & Stillman*, 633 F.2d at 593–99; *Burke*, 700 F.2d at 76–77; *Silkwood*, 563 F.2d at 436–37, including some acting on the basis of Rule 501, *see, e.g.*, *Riley v. City of Chester*, 612 F.2d 708, 715 (3d Cir. 1979) (recognizing a qualified common law privilege in civil litigation); *but see In re Grand Jury Proceedings*, 5 F.3d 397, 398 (9th Cir. 1993) (holding that no "scholar's privilege" exists under the First Amendment or common law). In addition, the Justice Department guidelines (though privately unenforceable, for reasons the court explains,

see majority op. at 20–23) establish a federal policy of protecting "news media from forms of compulsory process, whether civil or criminal, which might impair the news gathering function." 28 C.F.R. § 50.10. Denial of the privilege, then, would not only buck the clear policy of virtually all states, but would also contradict regulations binding on the federal government's own lawyers.

Resisting this consensus, the special counsel asserts that *Branzburg* already performed the analysis required by Rule 501, thus "resolv[ing] the common law argument." Appellee's Br. at 35; *see also* sep. op. at 1–3 (Sentelle, J., concurring). *Branzburg* did no such thing. As the *Branzburg* majority's very first sentence makes plain, the "issue" in that case was "whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press *guaranteed by the First Amendment,*" 408 U.S. at 667 (emphasis added), not whether it abridged the common law. Later emphasizing the same point, the majority stated, "Petitioners Branzburg and Pappas and respondent Caldwell press *First Amendment claims*." *Id.* at 679 (emphasis added); *see also* sep. op. at 3–4 (Henderson, J., concurring). Indeed, having examined the briefs and lower court opinions, I see no evidence that the parties ever even argued for a separate common law privilege. To be sure, the majority declared that "the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *id.* at 685, but that point served only to reinforce the majority's constitutional holding.

Nor does *Branzburg* support the concurrence's constitutional avoidance theory. *See* sep. op. at 2 (Sentelle, J., concurring). Although the *Branzburg* majority could have avoided the First Amendment claim by recognizing a common law privilege, given that the majority opinion neither did so nor even raised that possibility, *Branzburg's* holding hardly forecloses the common law argument presented here. Quite the contrary, *Branzburg* acknowledged that "Congress has freedom to deter-

mine whether a statutory newsman's privilege is necessary and desirable and to fashion standards and rules as narrow or broad as deemed necessary to deal with the evil discerned," 408 U.S. at 706, a power Congress delegated to the federal courts through Rule 501. Thus, if anything, the view that *Branzburg* disposed of the common law privilege gets it backwards. Insofar as *Branzburg* relied on the "great weight of authority" to discern the First Amendment's meaning, *see id.* at 686, the shift in favor of the privilege since that time–from seventeen states with statutory privileges then to thirty–one plus D.C. today, with another eighteen providing common law protection could provide a basis for rethinking *Branzburg*. *Cf. Atkins v. Virginia*, 536 U.S. 304, 306–07 (2002) (overturning prior understanding of Eighth Amendment "cruel and unusual punishment" based on a "consensus" among "the American public, legislators, scholars, and judges" regarding execution of the mentally retarded). Although that is something only the Supreme Court can do, this point underscores the error in seeing *Branzburg* as dispositive.

Given that the common law issue thus remains open, this court must assess the reporters' claim in light of "reason and experience" today. As *Branzburg* itself observes in describing Congress's powers, privilege rules may require "refashion[ing] . . . as experience from time to time may dictate." 408 U.S. at 706. Bestowing that refashioning power on the federal courts, Rule 501 evidences an "affirmative intention not to freeze the law of privilege," but rather "to leave the door open to change." *Trammel*, 445 U.S. at 47. Consistent with that intent, the Court *in Trammel* modified the privilege against adverse spousal testimony recognized just twenty–two years earlier in *Hawkins v. United States*, 358 U.S. 74 (1958), allowing the testifying spouse to waive the privilege, *see Trammel*, 445 U.S. at 53, even though *Hawkins* had held just the opposite, *see Hawkins*, 358 U.S. at 77–78. Had the Supreme Court addressed a common law claim in *Branzburg*, lower courts might lack authority to reconsider that case's result notwithstanding the subsequent growth in support for the privilege. *But Cf. Trammel*, 445 U.S. at 43

(affirming court of appeals decision limiting *Hawkins*). Absent such a definitive riling, however, and despite *Branzburg's* observation about the "great weight of authority" thirty–three years ago, *see* 408 U.S. at 686, we must approach the issue with the same open–mindedness demonstrated by *Trammel.*

For much the same reason, the omission of a reporter privilege from the Judicial Conference Advisory Committee's draft rules submitted to Congress in 1972 (and ultimately replaced by Rule 501) need not dictate the outcome here. True, as the special counsel points out, the Supreme Court in *United States v. Gillock*, 445 U.S. 360, 367–68 (1980), declined to recognize a privilege not appearing in the Advisory Committee draft. As that decision acknowledges, however, the draft rules merely reflected what was "thought to be . . . indelibly ensconced in our common law" at the time. *See id.* Accordingly, when the *Jaffee* Court considered whether the psychotherapist privilege extended to social workers, it relied not on the 1972 draft, which covered only licensed psychotherapists, but rather on the reasons for the privilege and the state laws in effect when *Jaffee* was decided. *See Jaffee*, 518 U.S. at 15–17 & n.16. Likewise, here, the dramatic growth in support for the reporter privilege supercedes the Advisory Committee's decades– old choice to omit the privilege from its draft.

Equally inconsequential is the adoption of the reporter privilege in thirty–one states through legislation, rather than judicial action. *See* sep. op. at 5 (Sentelle, J., concurring). As the *Jaffee* dissent pointed out, a far greater proportion of states–indeed, *every* state–established the psychotherapist privilege by statute, *see Jaffee*, 518 U.S. at 25–26 (Scalia, J., dissenting), yet the majority considered that fact "of no consequence," *Id.* at 13–14. Nor does it matter that unconventional forms of journalism freelance writers and internet "bloggers," for example—may raise definitional conundrums down the road. *See* sep. op. at 5–9 (Sentelle, J., concurring); *but see* Eugene Volokh, Opinion, *You Can Blog, But You Can't Hide*, N.Y. Times, Dec. 2, 2004, at A39 ("[T]he rules should be the same for old media and

new, professional and amateur. Any journalist's privilege should extend to every journalist."). As *Jaffee* makes clear, "[a] rule," such as Rule 501, "that authorizes the recognition of new privileges on a case–by–case basis makes it appropriate to define the details of new privileges in a like manner." 518 U.S. at 18. After all, "flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law." *Hurtado v. California*, 110 U.S. 516, 530 (1884). Here, whereas any meaningful reporter privilege must undoubtedly encompass appellants Cooper and Miller, full–time journalists for *Time* magazine and the *New York Times*, respectively, future opinions can elaborate more refined contours of the privilege–a task shown to be manageable by the experience of the fifty jurisdictions with statutory or common law protections.

In sum, "reason and experience," as evidenced by the laws of forty–nine states and the District of Columbia, as well as federal courts and the federal government, support recognition of a privilege for reporters' confidential sources. To disregard this modern consensus in favor of decades– old views, as the special counsel urges, would not only imperil vital newsgathering, but also shirk the common law function assigned by Rule 501 and "freeze the law of privilege" contrary to Congress's wishes, *see Trammel*, 445 U.S. at 47.

Scope of the Privilege

The next step, according to *Jaffee*, is to determine what principles govern the privilege's application in this case. *See Jaffee*, 518 U.S. at 15–16 (deciding first that a psychotherapist privilege exists and only then addressing whether the privilege applies to social workers). Pointing out that many jurisdictions recognize only qualified protection for reporters, the special counsel argues that the uniform judgment of states must support application of the privilege in the precise context at issue–defiance of grand jury subpoenas–before federal courts may recognize it. That view, however, belonged to the *Jaffee* dissent, not the

seven justice majority. Although the dissenters noted an "enormous degree of disagreement among the States as to the scope of the privilege," 518 U.S. at 33 (Scalia, J., dissenting), particularly as to which professions it covered, *see id.* at 27 (Scalia, J., dissenting), the Court extended the privilege to licensed social workers because "[t]he reasons for recognizing a privilege for treatment by psychiatrists and psychologists apply with equal force to treatment by a clinical social worker," *Id.* at 16–17. Likewise, *Jaffee* rejected a proposed balancing test not because other jurisdictions had done so, but because "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation of the relative importance of the patient's interest in privacy and the evidentiary need for disclosure would eviscerate the effectiveness of the privilege." *See id.* at 17–18.

Here, even assuming that some jurisdictions categorically exclude grand jury subpoenas—a proposition for which the special counsel cites no authority—the interests protected by the privilege militate against such a limited approach. Although the public interest in law enforcement may well be at its apex when the government is investigating crime, news stories of paramount First Amendment importance, such as reports about government corruption or wrongdoing, may involve sources who "would surely be chilled," *Jaffee*, 518 U.S. at 12, if they thought grand juries could discover their identities from reporters in whom they confide. Furthermore, the special counsel's proposal is quite anomalous, considering that neither the attorney– client, nor the spousal, nor even the psychotherapist privilege gives way to the grand jury's truth–seeking function. *See, e.g., Swidler & Berlin*, 524 U.S. at 403 (attorney– client); *Blau v. United States*, 340 U.S. 332, 333 (1951) (spousal); *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71, 72 (1st Cir. 1999) (allowing grand jury testimony not because no psychotherapist privilege exists in that context, but rather because a "crime–fraud exception" applies to the privilege).

As to the scope of the privilege, however, I agree with the special counsel that protection for source identities cannot be

absolute. Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several CIA operatives in the late 1970s and early 1980s, including the agency's Athens station chief *See Haig v. Agee*, 453 U.S. 280, 284–85 & n.7 (1981). Other leaks–the design for a top secret nuclear weapon, for example, or plans for an imminent military strike– could be even more damaging, causing harm far in excess of their news value. In such cases, the reporter privilege must give way. Just as attorney–client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Of course, in some cases a leak's value may far exceed its harm, thus calling into question the law enforcement rationale for disrupting reporter–source relationships. For example, assuming Miller's prize–winning Osama bin Laden series caused no significant harm, I find it difficult to see how one could justify compelling her to disclose her sources, given the obvious benefit of alerting the public to then–underappreciated threats from al Qaeda. News reports about a recent budget controversy regarding a super–secret satellite program inspire another example (though I know nothing about the dispute's details and express no view as to its merits). *See, e.g.*, Dan Eggen & Walter Pincus, *Justice Reviews Request for Probe of Satellite Reports*, Wash. Post, Dec. 16, 2004, at A3; Douglas Jehl, *New Spy Plan Said to Involve Satellite System*, N.Y. Times, Dec. 12, 2004, at A1. Despite the necessary secrecy of intelligence– gathering methods, it seems hard to imagine how the harm in leaking generic descriptions of such a program could outweigh the benefit of informing the public about billions of dollars wasted on technology considered duplicative and unnecessary by leading Senators from both parties. In contrast to the nuclear weapon and military strike examples mentioned above,

cases like these appear to involve a balance of harm and news value that strongly favors protecting newsgathering methods.

Given these contrasting examples, much as our civil cases balance "the public interest in protecting the reporter's sources against the private interest in compelling disclosure," *Zerilli*, 656 F.2d at 712; *see also Carey*, 492 F.2d at 634–36, so must the reporter privilege account for the varying interests at stake in different source relationships. In other words, to quote the Justice Department subpoena guidelines, "the approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." 28 C.F.R. § 50.10(a).

Citing our reporter privilege cases—*Zerilli*, *Carey*, and *Ahn*—the special counsel urges us to rely on two factors deemed "central" in those decisions and emphasized in the Justice Department guidelines: first, the requesting party's need for the evidence, and second, that party's exhaustion of alternative sources. *See Zerilli*, 656 F.2d at 712–14; *Ahn*, 231 F.3d at 37; *Carey*, 492 F.2d at 636–37, 638; 28 C.F.R. § 50.10(b), (f)(1). While both these considerations are obviously essential to minimizing the burden on newsgathering, they can serve as exclusive measures in the privilege analysis only where there exist means of proof other than compelling the reporter's testimony. When prosecuting crimes other than leaks (murder or embezzlement, say) the government, at least theoretically, can learn what reporters know by replicating their investigative efforts, *e.g.*, speaking to the same witnesses and examining the same documents. Accordingly, if a truly exhaustive investigation has failed to prove a crime that the government reasonably believes has occurred, compelled disclosure of a reporter's source may be justified notwithstanding the attendant burdens on newsgathering. As the special counsel acknowledged at oral argument, however, when the government seeks to punish a leak, a test focused on need and exhaustion will almost always be satisfied, leaving the reporter's source unprotected regardless of

the information's importance to the public. The reason for this is obvious: Insofar as the confidential exchange of information leaves neither paper trail nor smoking gun, the great majority of leaks will likely be unprovable without evidence from either leaker or leakee. Of course, in some cases, circumstantial evidence such as telephone records may point towards the source, but for the party with the burden of proof, particularly the government in a criminal case, such evidence will often be inadequate.

In leak cases, then, courts applying the privilege must consider not only the government's need for the information and exhaustion of alternative sources, but also the two competing public interests lying at the heart of the balancing test. Specifically, the court must weigh the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value. That framework allows authorities seeking to punish a leak to access key evidence when the leaked information does more harm than good, such as in the nuclear weapon and military strike examples, while preventing discovery when no public interest supports it, as would appear to be the case with Miller's Osama bin Laden articles. Though flexible, these standards (contrary to the special counsel's claim) are hardly unmanageable. Indeed, the Supreme Court employs a similar requirement of "legitimate news interest," meaning "value and concern to the public at the time of publication," in assessing restrictions on government employee speech. *See City of San Diego v. Roe*, ___ U.S. ___, 125 S. Ct. 521, 526 (2004) (per curiam). Nor is this analysis "novel," *see* sep. op. at 3 (Henderson, J., concurring), considering its basis in *Zerilli* and *Carey* and the Justice Department's own guidelines.

Though recognizing that leaks with "national security implications" raise different concerns from "information in the nature of 'whistleblowing,' " Appellee's Br. at 44, 48, the special counsel insists that the prosecutor, not the court, should assess factors other than need and exhaustion. Under this theory,

balancing the two remaining concerns, the harmfulness of the leaked information and the damage to newsgathering that might flow from enforcing the disputed subpoenas, would be a matter of prosecutorial discretion. In my view, the special counsel's position distorts the roles of judge and prosecutor in evidentiary disputes.

Although courts certainly defer to executive judgments about which crimes merit prosecution—a judgment that is, after all, a "core executive constitutional function," *United States v. Armstrong*, 517 U.S. 456, 465 (1996)—nonetheless the executive branch possesses no special expertise that would justify judicial deference to prosecutors' judgments about the relative magnitude of First Amendment interests. Assessing those interests traditionally falls within the competence of courts. *Cf. Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978) ("Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake."). Indeed, while the criminality of a leak and the government's decision to press charges might well indicate the leak's harmfulness–a central concern of the balancing test–once prosecutors commit to pursuing a case they naturally seek all useful evidence. Consistent with that adversarial role, the Federal Rules of Evidence assign to courts the function of neutral arbiter: "Preliminary questions concerning the qualification of a person to be a witness, *the existence of a privilege*, or the admissibility of evidence shall be determined by the court." Fed. R. Evid. 104(a) (emphasis added). Accordingly, just as courts determine the admissibility of hearsay or the balance between probative value and unfair prejudice under Rule 403, so with respect to this issue must courts weigh factors bearing on the privilege.

Moreover, in addition to these principles applicable to the judicial role in any evidentiary dispute, the dynamics of leak inquiries afford a particularly compelling reason for judicial scrutiny of prosecutorial judgments regarding a leak's harm and news value. Because leak cases typically require the government to investigate itself, if leaks reveal mistakes that high–level offi-

cials would have preferred to keep secret, the administration may pursue the source with excessive zeal, regardless of the leaked information's public value. Of course, in this case a special counsel was appointed to exercise independent judgment. Yet independent prosecutors, too, may skew their assessments of the public interests implicated when a reporter is subpoenaed. After all, special prosecutors, immune to political control and lacking a docket of other cases, face pressure to justify their appointments by bagging their prey. *Cf. Morrison v. Olson*, 487 U.S. 654, 727–28 (1988) (Scalia, J., dissenting) (noting "the vast power and the immense discretion that are placed in the hands of a prosecutor with respect to the objects of his investigation" and observing that "the primary check against prosecutorial abuse is a political one"). To be clear: I do not impugn the motives of this special counsel. Indeed, as I conclude below, his pursuit of the reporters' testimony appears reasonable. Nevertheless, these considerations–the special counsel's political independence, his lack of a docket, and the concomitant risk of overzealousness–weigh against his claim to deference in balancing harm against news value.

Paralleling the special counsel's argument about executive discretion, my concurring colleague suggests that my approach pays insufficient deference to Congress. *See* sep. op. at 8 (Henderson, J., concurring). "*Branzburg*," she writes, "warns of the risk inherent in the judicial assessment of the importance of prosecuting particular crimes." *See id.* Although it is true that *Branzburg* cautioned against second–guessing the "legislative judgment . . . of what conduct is liable to criminal prosecution," 408 U.S. at 706, it did so in a passage rejecting a test of governmental need that apparently "distinguish[ed] between the value of enforcing different criminal laws," deeming some statutes "compelling" and others unimportant. *See id.* at 702, 705–06. The approach I propose entails no such judgment about the value of the statute under which the government is proceeding. Rather, my approach focuses on whether evidence the government believes it needs, *i.e.*, a reporter's testimony about

a particular source, is privileged. To be sure, insofar as the reporter's testimony is critical in a particular case, privileging the evidence may render that case unprovable. But that risk accompanies any privilege or indeed any rule of evidentiary exclusion. Had Congress believed that judicial decisions excluding evidence interfered with its "legislative judgment" regarding underlying crimes, it would hardly have authorized recognition of common law privileges by enacting Rule 501.

Furthermore, and perhaps even more important, *Branzburg* addressed only a First Amendment privilege claim. *See supra* at 14. In that case, therefore, because Congress cannot overturn constitutionally based decisions, recognizing the asserted privilege would have permanently foreclosed punishment of any crimes dependent on proof subject to the privilege. The qualified privilege I would recognize, however, rests on Rule 501, not the Constitution. If Congress believes that this approach overrides its judgment about what conduct should be criminal, it may simply overturn the privilege and authorize use of the evidence.

Next, the special counsel argues that waivers signed by suspected sources represent an "additional factor" favoring compulsion of the reporters' testimony. Appellee's Br. at 46. As the reporters point out, however, numerous cases (including persuasive district court decisions from this circuit) indicate that only reporters, not sources, may waive the privilege. *See, e.g., United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *Palandjian v. Pahlavi*, 103 F.R.D. 410, 413 (D.D.C. 1984); *Anderson v. Nixon*, 444 F. Supp. 1195, 1198–99 (D.D.C. 1978). For the contrary proposition, the special counsel cites *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), but that case involved a criminal defendant's effort to obtain non–confidential records from the biographers of a government witness, not waiver of confidentiality by a previously unidentified source. *See id.* at 531, 533–34. Nor does *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002), help the special counsel. While that decision indicated that " 'the absence of confidentiality may

be considered in the balance of competing interests as a factor that diminishes the journalist's, and the public's, interest in nondisclosure,' " *Id.* at 120 (quoting *Shoen v. Shoen*, 5 F.3d 1289, 1295 (9th Cir. 1993)), it quashed the subpoena at issue, reasoning that "the privilege for journalists shields both confidential and nonconfidential information from compelled disclosure," *id.*

As this case law recognizes, a source's waiver is irrelevant to the reasons for the privilege. Because the government could demand waivers–perhaps even before any leak occurs–as a condition of employment, a privilege subject to waiver may, again, amount to no privilege at all, even in those leak cases where protecting the confidential source is most compelling. Moreover, although the attorney–client and psychotherapist privileges are waivable by clients and patients, respectively, *see, e.g., In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989) (attorney–client); *Jaffee*, 518 U.S. at 15 n.14 (psychotherapist), that is because those privileges exist to prevent disclosure of sensitive matters related to legal and psychological counseling, *see, e.g., Swidler & Berlin*, 524 U.S. at 407–08; *Jaffee*, 518 U.S. at 10–11, a rationale that vanishes when the source authorizes disclosure. In contrast, the reporter privilege safeguards public dissemination of information—the *reporter's* enterprise, not the source's.

Consistent with that purpose, the privilege belongs to the reporter. Not only are journalists best able to judge the imperatives of newsgathering, but while the source's interest is limited to the particular case, the reporter's interest aligns with the public, for journalists must cultivate relationships with other sources who might keep mum if waiving confidentiality at the government's behest could lead to their exposure. Indeed, as compared to counseling–related privileges, the privilege against spousal testimony represents a better analogy. Just as under *Trammel's* waiver theory testifying spouses, regardless of the other spouse's wishes, may judge for themselves whether their testimony will undermine "marital harmony," *see Trammel*, 445

U.S. at 44–45, 52–53, so should journalists–the experts in news-gathering–base the decision to testify on their own assessment of the consequences, unconstrained by their source's waiver (provided other requirements of the privilege are met).

For their part, appellants insist that a qualified privilege fails to provide the certainty their work requires because sources are unlikely to disclose information without an advance guarantee of secrecy. In particular, they argue that journalists cannot balance a leak's harm against its news value until they know what information the source will reveal, by which time it is too late to prevent disclosure. True enough, but journalists are not the ones who must perform the balancing; sources are. Indeed, the point of the qualified privilege is to create disincentives for the source–disincentives that not only promote the public interest, but may also protect journalists from exploitation by government officials seeking publication of damaging secrets for partisan advantage. Like other recipients of potentially privileged communications–say, attorneys or psychotherapists–the reporter can at most alert the source to the limits of confidentiality, leaving the judgment of what to say to the source. While the resulting deterrent effect may cost the press some leads, little harm will result, for if the disincentives work as they should, the information sources refrain from revealing will lack significant news value in the first place.

In any event, although *Jaffee* said that "[m]aking the promise of confidentiality contingent upon a trial judge's later evaluation . . . [will] eviscerate the effectiveness of the privilege," 518 U.S. at 17, the clash of fundamental interests at stake when the government seeks discovery of a reporter's sources precludes a categorical approach. *See Zerilli*, 656 F.2d at 712 n.46 (rejecting arguments for greater "specificity" as to the scope of the First Amendment privilege in civil litigation). And as we explained in *Zerilli*, the "deterrence effect" on beneficial news-gathering will be small if courts make clear that the privilege is "overridden only in rare circumstances." *See id.* at 712 & n.46.

In short, the question in this case is whether Miller's and Cooper's sources released information more harmful than newsworthy. If so, then the public interest in punishing the wrongdoers–and deterring future leaks– outweighs any burden on newsgathering, and no privilege covers the communication (provided, of course, that the special counsel demonstrates necessity and exhaustion of alternative evidentiary sources).

III.

Applying this standard to the facts of this case, and considering fast only the public record, I have no doubt that the leak at issue was a serious matter. Authorized "to investigate and prosecute violations of any federal criminal laws related to the underlying alleged unauthorized disclosure, as well as federal crimes committed in the course of, and with intent to interfere with, [his] investigation, such as perjury, obstruction of justice, destruction of evidence, and intimidation of witnesses," *see* Letter from James B. Comey, Acting Attorney General, to Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois (Feb. , 2004), the special counsel is attempting to discover the origins of press reports describing Valerie Plame as a CIA operative monitoring weapons of mass destruction. *See* majority op. at 3–5. These reports appeared after Plame's husband, former Ambassador Joseph Wilson, wrote in a *New York Times* op–ed column that his findings on an official mission to Niger in 2002 cast doubt on President Bush's assertion in his January 2003 State of the Union address that Iraq "recently sought significant quantifies of uranium from Africa." *See id.* at 3.

An alleged covert agent, Plame evidently traveled overseas on clandestine missions beginning nearly two decades ago. *See, e.g.*, Richard Leiby Dana Priest, *The Spy Next Door; Valerie Wilson, Ideal Mom Was Also the Ideal Cover*, Wash. Post, Oct. 8, 2003, at Al. Her exposure, therefore, not only may have jeopardized any covert activities of her own, but also may have endangered friends and associates from whom she might have

gathered information in the past. Acting to criminalize such exposure of secret agents, *see* 50 U.S.C. § 421, Congress has identified that behavior's "intolerable" consequences: "[t]he loss of vital human intelligence which our policymakers need, the great cost to the American taxpayer of replacing intelligence resources lost due to such disclosures, and the greatly increased risk of harm which continuing disclosures force intelligence officers and sources to endure." S. Rep. No. 97–201, at 10–11 (1981), *reprinted in* 1982 U.S.C.C.A.N. 145, 154–55.

The leak of Plame's apparent employment, moreover, had marginal news value. To be sure, insofar as Plame's CIA relationship may have helped explain her husband's selection for the Niger trip, that information could bear on her husband's credibility and thus contribute to public debate over the president's "sixteen words." Compared to the damage of undermining covert intelligence–gathering, however, this slight news value cannot, in my view, justify privileging the leaker's identity.

Turning now to the classified material, I agree with the special counsel that ex parte review presents no due process difficulty. To be sure, grand jury secrecy is not absolute. As Rule 6(e) itself provides, courts may "authorize disclosure . . . of a grand jury matter . . . preliminarily to or in connection with a judicial proceeding." Fed. R. Crim. P. 6(e)(3)(E). In addition, as the reporters point out, even apart from *United States v. Dinsio*, 468 F.2d 1392 (9th Cir. 1973), now superceded by *United States v. Mara*, 410 U.S. 19 (1973), *see* majority op. at 19 (citing *In re Braughton*, 520 F.2d 765, 767 (9th Cir. 1975)), the Second and Ninth Circuits have held that due process requires an "uninhibited adversary hearing" in civil contempt proceedings, *see United States v. Alter*, 482 F.2d 1016, 1024 (9th Cir. 1973) (internal quotation marks omitted); *In the Matter of Kitchen*, 706 F.2d 1266, 1272 (2d Cir. 1983) (internal quotation marks omitted), including "the right to confront all the government's evidence, both documentary and testimonial, unless particular and compelling reasons peculiar to the grand jury function require some curtailment of [that] right," *Kitchen*, 706 F.2d at 1272.

In this circuit, however, we have approved the use of "*In camera, ex parte* proceedings to determine the propriety of a grand jury subpoena or the existence of a crime–fraud exception to the attorney–client privilege when such proceedings are necessary to ensure the secrecy of ongoing grand jury proceedings." *In re Sealed Case No. 98–3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam). Just as due process poses no barrier to forcing an attorney to testify based on the court's examination of evidence, unseen by the lawyer, that the client sought legal advice in pursuit of a crime, neither does it preclude compulsion of a reporter's testimony based on a comparable review of evidence, likewise unseen by the reporter, that a source engaged in a harmful leak. In fact, appellants' protests notwithstanding, ex parte review protects their interests, as it allows the government to present–and the court to demand–a far more extensive showing than would otherwise be possible given the need for grand jury secrecy discussed in the court's opinion, *see* majority op. at 17–18.

That said, without benefit of the adversarial process, we must take care to ensure that the special counsel has met his burden of demonstrating that the information is both critical and unobtainable from any other source. Having carefully scrutinized his voluminous classified filings, I believe that he has.

With respect to Miller, * * * * * [REDACTED] * * * * *

Regarding Cooper, * * * * * [REDACTED] * * * * *

In sum, based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony. Thus, considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas.

One last point. In concluding that no privilege applies in this case, I have assigned no importance to the fact that neither Cooper nor Miller, perhaps recognizing the irresponsible (and quite possibly illegal) nature of the leaks at issue, revealed Plame's employment, though Cooper wrote about it after Novak's column appeared. Contrary to the reporters' view, this apparent self– restraint spares Miller and Cooper no obligation to testify. Narrowly drawn limitations on the public's right to evidence, testimonial privileges apply "only where necessary to achieve [their] purpose," *Fisher v. United States*, 425 U.S. 391, 403 (1976), and in this case the privilege's purpose is to promote dissemination of useful information. It thus makes no difference how these reporters responded to the information they received, any more than it matters whether an attorney drops a client who seeks criminal advice (communication subject to the crime–fraud exception) or a psychotherapist seeks to dissuade homicidal plans revealed during counseling (information *Jaffee* suggested would not be privileged, *see* 518 U.S. at 18 n.19). In all such cases, because the communication is unworthy of protection, recipients' reactions are irrelevant to whether their testimony may be compelled in an investigation of the source.

Indeed, Cooper's own *Time.com* article illustrates this point. True, his story revealed a suspicious confluence of leaks, contributing to the outcry that led to this investigation. Yet the article had that effect precisely because the leaked information —Plame's covert status—lacked significant news value. In essence, seeking protection for sources whose nefariousness he himself exposed, Cooper asks us to protect criminal leaks so that he can write about the crime. The greater public interest lies in preventing the leak to begin with. Had Cooper based his report on leaks *about* the leaks–say, from a whistleblower who

revealed the plot against Wilson–the situation would be different. Because in that case the source would not have revealed the name of a covert agent, but instead revealed the fact that others had done so, the balance of news value and harm would shift in favor of protecting the whistleblower. Yet it appears Cooper relied on the Plame leaks themselves, drawing the inference of sinister motive on his own. Accordingly, his story itself makes the case for punishing the leakers. While requiring Cooper to testify may discourage future leaks, discouraging leaks of this kind is precisely what the public interest requires.

IV.

I conclude, as I began, with the tensions at work in this case. Here, two reporters and a news magazine, informants to the public, seek to keep a grand jury uninformed Representing two equally fundamental principles rule of law and free speech–the special counsel and the reporters both aim to facilitate frilly informed and accurate decision-making by those they serve: the grand jury and the electorate. To this court falls the task of balancing the two sides' concerns.

As James Madison explained, "[A] people who mean to be their own Governors must arm themselves with the power which knowledge gives." *See In re Lindsey*, 148 F.3d 1100, 1109 (D.C. Cir. 1998) (quoting Letter from James Madison to W.T. Barry (Aug. 4, 1822), *in* 9 The Writings of James Madison 103 (Gaillard Hunt ed., 1910)). Consistent with that maxim, "[a] free press is indispensable to the workings of our democratic society," *Associated Press v. United States*, 326 U.S. 1, 28 (1945) (Frankfurter, J., concurring), and because confidential sources are essential to the workings of the press—a practical reality that virtually all states and the federal government now acknowledge—I believe that "reason and experience" compel recognition of a privilege for reporters' sources. That said, because "[l]iberty can only be exercised in a system of law which safeguards order," *Cox v. Louisiana*, 379 U.S. 559, 574

(1965), the privilege must give way to imperatives of law enforcement in exceptional cases.

Were the leak at issue in this case less harmful to national security or more vital to public debate, or had the special counsel failed to demonstrate the grand jury's need for the reporters' evidence, I might have supported the motion to quash. Because identifying appellants' sources instead appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

In re: Special Counsel Investigation

Misc. No. 04-407 (TFH)

ORDER

Pending before the Court is the Motion of the UNITED STATES OF AMERICA, by PATRICK J. FITZGERALD, SPECIAL COUNSEL, to hold witness Judith Miller in civil contempt of court pursuant to 28 U.S.C. § 1826. After conducting a hearing on October 7, 2004 and being fully advised, this Court finds as follows:

1. Judith Miller, having received subpoenas for grand jury testimony and the production of certain documents, moved to quash the subpoenas, and this Court denied the motion to quash for reasons stated in its Memorandum Opinion dated September 9, 2004.

2. Judith Miller has, in person and through counsel, refused to comply with the grand jury subpoenas without just cause.

3. Based on this refusal, Judith Miller is in civil contempt of this Court.

4. Judith Miller has indicated her intention to pursue appeals to the United States Court of Appeals for the District of Columbia Circuit of this Court's order finding her in contempt. This appeal is brought in good faith and raises substantial issues of law.

5. Judith Miller has agreed to file her notice of appeal on or before October 12, 2004, and the parties have agreed to propose an expedited briefing schedule in the Court of Appeals requiring the filing of appellant's brief on October 22, 2004, the filing of appellee's brief of November 3, 2004, and the filing of appellant's reply on November 10, 2004.

Based on the foregoing finds of fact, and for the reasons stated in open court, it is hereby

ORDERED that:

1. Judith Miller is ordered confined at a suitable place until such time as she is willing to comply with the grand jury subpoenas. The period of confinement shall not exceed the life of the term of the grand jury, including extensions, and in no event shall exceed eighteen months; and

2. Judith Miller is granted bail pending appeal of the court's finding of contempt to the United States Court of Appeals for the District of Columbia Circuit.

SO ORDERED.

October 7, 2004

/s/ Thomas F. Hogan
The Honorable Thomas F. Hogan
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION

Misc. No. 04-407 (TFH)

ORDER

Pending before the Court is "Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order." For the reasons stated in the accompanying Memorandum Opinion, it is hereby

ORDERED that the motion is **DENIED**. It is further

ORDERED that the parties are to submit to the Court no later than Wednesday, September 15, 2004 a motion stating any and all elements of the accompanying Memorandum Opinion dated September 9, 2004 that they believe should be redacted before the Memorandum Opinion is made public and published. The motion shall explain the reasons the parties believe the identified portions should be redacted. The parties may submit a joint or individual motions for redactions. If the parties believe that no redactions are necessary, they shall notify the Court of this writing no later than Wednesday, September 15, 2004.

SO ORDERED.

September 9, 2004

/s/ Thomas F. Hogan
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION

Misc. No. 04-407 (TFH)

UNDER SEAL*

MEMORANDUM OPINION

Pending before the Court is Motion of Judith Miller to Quash Grand Jury Subpoenas and/or for Protective Order. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Ms. Miller is a journalist who was asked to appear before the grand jury to testify regarding alleged conversations she had with a specified Executive Branch official. For the reasons set forth in this Court's July 20, 2004 Memorandum Opinion in the cases Misc. Nos. 04-296 and 04-297, as well as the additional reasons stated below, the Court denies the motion to quash.

Background

The facts surrounding this case are outlined in the Court's Memorandum Opinion of July 20, 2004, and therefore the Court will only briefly address Ms. Miller's role in case. Judith Miller is an investigative reporter for *The New York Times*. Although Ms. Miller never wrote an article about Ambassador Joseph

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* This opinion was unsealed by order of the district court.

Wilson or his wife Valerie Plame, she contemplated writing one. In preparation, Ms. Miller spoke with one or more confidential sources regarding Ambassador Wilson's article, "What I Didn't Find in Africa." Affidavit of Judith Miller ¶¶ 1, 5. The Office of Special Counsel Patrick Fitzgerald has served two subpoenas on Ms. Miller: one requesting her testimony before the grand jury regarding confidential conversation she had with a specified administration official and the other asking her to produce specific documents relating to those conversations. Government's Response to Motion to Quash Grand Jury Subpoenas ("Gov't Opp'n") at 3. As was the case with the subpoenas issued upon Mr. Cooper and Mr. Russert addressed in the Court's July 20, 2004 Opinion, the specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each reporter had with a confidential source.

Ms. Miller objects to the subpoenas using the same legal arguments that were raised by Mr. Cooper and Mr. Russert and which the Court ruled upon in its July 20, 2004 Memorandum Opinion. That ruling is incorporated by reference to this case. The Court issues this Opinion, however, to address one new argument that Ms. Miller included in her Motion to Quash and asserted at the motions hearing held on September 3, 2004.

Before addressing that argument, the Court will first note that as was the case with Mr. Cooper and Mr. Russert, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal in this matter. Gov't Opp'n at 1. As previously held in the July 20, 2004 Opinion, this Court is not convinced that the DOJ guidelines vest any right in the movant in this case. Assuming, *arguendo*, that the DOJ guidelines did vest a right in Ms. Miller, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that Ms. Miller did possess a qualified privilege—a holding which the Court rejected in its July 20, 2004 Opinion—the *ex parte* affidavit has also established that

Special Counsel would be able to meet event the most stringent of balancing tests. The information requested from Ms. Miller is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt.

Analysis

The Court addresses here an argument offered by Ms. Miller and further supported in the brief in support of the motion to quash submitted by eighteen major news organizations and reporters' groups appearing as amici curiae in this case. Ms. Miller points to Federal Rule of Evidence 501 and the Supreme Court's ruling in *Jaffe* v. *Redmond*, 518 U.S. 1 (1996), for the proposition that this Court may recognize a reporters privilege based in federal common law despite its holding that *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), establishes that there is not First Amendment or common law privilege exempting the press from testifying before a grand jury acting in good faith. Motion of Judith Miller to Quash Subpoenas and/or for Protective Order ("Miller Mot.") at 19-21.

Federal Rule of Evidence 501, enacted in 1975, states that privileges in federal criminal cases "shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. By enacting Rule 501, Congress gave federal courts the authority to "continue the evolutionary development of testimonial privileges." *Trammel* v. *United States*, 445 U.S. 40, 47 (1980). Rule 501 provides "the courts with the flexibility to develop rules of privilege on a case-by-case basis" and "leave[s] the door open to change." *Id.* In *Jaffee* v. *Redmond*, the Supreme Court articulated the analysis courts should undertake when determining whether to recognize a common law privilege under Rule 501. 518 U.S. 1 (1996).

The *Jaffe* Court explained that when determining whether a privilege should be recognized, a court should begin with the fundamental maxim that the public "has a right to every man's evidence." 518 U.S. at 9. "Exceptions from the general rule disfavoring testimonial privileges may be justified, however, by a public good transcending the normally predominate principle of utilizing all rational means for ascertaining truth." *Id.* (internal citations omitted). Accordingly, a privilege can and should be recognized under Rule 501 if that privilege "promotes sufficiently important interests to outweigh the need for probative evidence." *Id.* at 9-10. This Court acknowledges that common law testimonial privileges may be created by courts under Rule 501 and the Supreme Court's opinion in *Jaffe*.

The issue before the Court is whether it should recognize a reporters privilege under Rule 501 and Jaffe. Ms. Miller argues that the Court should recognize such a privilege. In arguing that because the Court *can* recognize a common law privilege it therefore *should* recognize a reporters privilege in this case, Ms. Miller tries to jump a chasm in two leaps.[1] Although *Branzburg* was decided three years prior to the adoption of rule 501, the *Branzburg* Court already undertook the analysis of whether the public benefit as issue "outweigh[ed] the need for probative evidence" required under *Jaffe*. *Jaffe* 518 U.S. at 9-10.

In *Branzburg*, the Court made clear what issue was before it stating, "The heart of the claims is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." 408 U.S. at 681. As previously explained in the July 20, 2004 Opinion, the *Branzburg* Court concluded that the public's interest in fighting crime outweighed an burden on news gathering that would result from requiring reporters to testify before a grand jury. As the *Branzburg* Court explained:

> Fair and effective law enforcement aimed at providing security for the person and property of the individual is a

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[1] Cf. "The most dangerous strategy is to jump a chasm in two leaps." Benjamin Disraeli, British politician (1804 - 1881).

> fundamental function of government, and the grand jury plays an important, constitutionally mandated role in this process . . . we perceive no basis for holding that the public interest in law enforcement and in ensuring effective grand jury proceedings is insufficient to override the consequential, but uncertain, burden on news gathering that is said to result from insisting that reporters, like other citizens, respond to relevant questions put to them in the course of a valid grand jury investigation or criminal trial.

Id. at 690-91.

Ms. Miller's argument that this Court should establish a common law privilege despite the balancing test already undertaken by the Supreme Court in *Branzburg* is even less convincing in light of what precisely the *Branzburg* Court was balancing. In *Branzburg*, the Court weighed as asserted First Amendment-based protection of the press against the need for probative evidence in grand juries in order to protect society from crime. To say it differently, the Court pitted a Constitutionally-based freedom of the press against society's need to fight crime, and concluded that the need to protect society from crime was more important than the burden on news gathering. Here, Ms. Miller asks the Court to repeat the same balancing test, but instead of supporting her argument with the weighty claim of First Amendment protection, she bases it on a privilege allegedly created through case law and Rule 501. The arguments in favor of protection of the press are weaker in this context, yet Ms. Miller asks this Court to come to the opposite conclusion of the Supreme Court in *Branzburg*. The Court declines to do so.

This Court holds that Ms. Miller has no privilege, based in the First Amendment or common law, qualified or otherwise, excusing her from testifying before the grand jury in this matter. Therefore, under the holding in *Branzburg* and its progeny, Ms. Miller must fulfill her obligation, shared by all citizens, to

answer a valid subpoena issued to her by a grand jury acting in good faith. An appropriate order will accompany this opinion.

September 9, 2004

/s/ Thomas F. Hogan
Thomas F. Hogan
Chief Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION

Misc. No. 04-296 (TFH)
04-297 (TFH)

MEMORANDUM OPINION

Pending before the Court are two motions to quash subpoenas filed by journalists, Matthew Cooper and Tim Russert. The subpoenas were issued by Special Counsel Patrick Fitzgerald as part of the ongoing investigation into the potentially illegal disclosure of the identity of CIA official Valerie Plame. Specifically, *Time* magazine reporter Matthew Cooper and NBC Washington Bureau Chief Tim Russert were asked to appear before the grand jury to testify regarding alleged conversations they had with a specified Executive Branch official. Because this Court holds that the U.S. Supreme Court unequivocally rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith, this Court denies the motions to quash.

Background

On July 6, 2003, the *New York Times* published former Ambassador Joseph Wilson's column "What I Didn't Find in Africa," in which he charged that President Bush had "twisted" intelligence related to Iraq's nuclear program in his 2003 State of the Union Address. After the article was published, Ambassador Wilson's article and other statements he made to members

of the media were extensively reported on by a number of news outlets. Motion of Non-Party Tim Russert to Quash Grand Jury Subpoena ("Russert Mot.") at 2-3.

On July 14, 2003, the *Washington Post* and other newspapers published a column written by Robert Novak in which he identified Ambassador Wilson's wife, Valerie Plame, as a CIA Officer. Specifically, the article reported that Ambassador Wilson's "wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger." Russert Mot. at 3. Two months after that article was published, the *Post* reported that "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." *Id.*

In December 2003, the Department of Justice appointed United States Attorney Patrick Fitzgerald as Special Counsel to investigate the allegations that one or more Executive Branch officials unlawfully disclosed the name of a purported covert CIA operative, Valerie Plame. Russert Mot. at 3. On May 21, 2004, grand jury subpoenas were issued to Mr. Cooper and Mr. Russert. Subsequent discussions between each reporter's respective attorneys and Special Counsel revealed that Mr. Fitzgerald intended to question each journalist about alleged discussions they had with a specified Executive Branch official. The specific subject matter Special Counsel will address before the grand jury is quite circumscribed, but it does delve into alleged conversations each reporter had with a confidential source. Russert Mot. at 4; Motion of Matthew Cooper to Quash Subpoena and/or for Protective Order ("Cooper Mot.") at 6-7.

Mr. Cooper and Mr. Russert base their motions to quash the grand jury subpoenas on the grounds that they violate the reporters privilege embodied in the First Amendment and common law. They also point to the D.C. Shield Law, D.C. Code Ann. §§ 16-4702(1), 4703(b) (2001) and the Department of Justice's own policy statements regarding the issuance of subpoenas to members of the press, 26 C.F.R. § 50.10, as further

support that the subpoenas should be quashed. In addition to the papers submitted in opposition to the motions to quash, Mr. Fitzgerald submitted an *ex parte* affidavit filed under seal. Government's Response to Motion to Quash Grand Jury Subpoena [re: Cooper] ("Gov't Opp'n to Cooper") at 1.

Analysis

This Court need not search far to find a case which directly addresses the issues currently before it. In *Branzburg* v. *Hayes*, the United States Supreme Court squarely addressed the application of a reporters privilege in the context of a grand jury. *Branzburg* v. *Hayes*, 408 U.S. 665 (1972). In that case, the Supreme Court consolidated into one opinion four cases involving journalists who were subpoenaed before grand juries and asked to testify about, *inter alia*, the identity of informants and information they had been told in confidence. The reporters objected to the subpoenas based on their rights under the First Amendment. *Id.* at 672.

In the Court's opinion, Justice White explained that any incidental burden that testifying before a grand jury may have on the journalists was far outweighed by society's interest is law enforcement. *Branzburg*, 408 U.S. at 690-91. The Court acknowledged the vital, constitutionally mandated role that grand juries have in the government's fundamental function of ensuring "[f]air and effective law enforcement aimed at providing security for the person and property of the individual." *Id.* It is the responsibility of every citizen to appear before a grand jury in order to assist that body with its essential tasks. *Id.* at 682.

The *Branzburg* Court held that the First Amendment concerns should not alter news-gatherers obligations to testify before grand juries because asking members of the press to appear before the grand juries "involve[s] no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold." *Id.* at 681. The journalists were

not being forbidden from continuing to use confidential sources, nor where they being asked to indiscriminately disclose the identity of their sources upon request. *Id.* at 681-82. The Court acknowledged that the reporters' argument that the dissemination of news to the public would be diminished by forcing members of the press to testify before grand juries was a rational concern. This fear, however, did not carry much weight with the Court which found that evidence of such an inhibiting effect of grand jury subpoenas was "widely divergent and to a great extent speculative." *Id.* at 693-94. "We cannot accept the argument that the public interest in possible future news about crime . . . . must take precedence over the public interest in pursuing and prosecuting those crimes." *Id.* at 695. The *Branzburg* Court held that there is no First Amendment privilege exempting members of the press from appearing before grand juries upon issuance of a valid subpoena. Furthermore, common law provides no such reporters privilege. *Id.* at 685 ("At common law, courts consistently refused to recognize the existence of any privilege authorizing a newsman to refuse to reveal confidential information to a grand jury."). In the absence of a grand jury acting in bad faith or with the sole purpose of harassment, *Branzburg* makes clear that neither the First Amendment nor common law protect reporters from their obligations shared by all citizens to testify before the grand jury when called to do so.

Rather than agreeing that no reporters privilege exists in the grand jury context, Petitioners assert that *Branzburg* actually stands for the proposition that reporters enjoy a qualified privilege under the First Amendment and courts should employ a balancing test when faced with a reporter subpoenaed before a grand jury. Cooper Mot. at 8-10; Russert Mot. at 7-8. This argument fails for many reasons. The *Branzburg* Court explicitly rejected the idea that a qualified privilege exists in the grand jury context when that grand jury is acting in good faith. *Branzburg* v. *Haves*, 408 U.S. 665, 703 (1972). Justice White explained that a qualified privilege would not be feasible because it would present practical and conceptual difficulties for

courts such as requiring them to define the categories of journalists who qualified for the privilege—an extremely difficult task under the Court's First Amendment jurisprudence. *Id.* at 703-04. Courts would be forced to answer questions that would embroil them in preliminarily determinations such as whether there is probable cause to believe a crime has been committed, whether there is a sufficient likelihood that the journalist has useful information, and most suspect, whether protecting society against a specific type of criminal activity is more important than protecting a reporter's rights. *Id.* at 705-06. The Court refused to require courts to become involved in such an analysis, and therefore, expressly refused to find that the press has any qualified privilege against testifying before a grand jury.

Petitioners rest their claim that *Branzburg* stands for a qualified privilege for reporters on the assumption that the holding of in the case is controlled by Justice Powell who joined the majority opinion, but issued a separate concurrence. Cooper argues that in a 5-4 majority where a member of the majority writes a separate concurring opinion as is the case in *Branzburg*, the concurring opinion "represents the holding of the Court on the rationale that the majority opinion is not a true majority except to the extent that it accords with the views of the concurrence." Cooper Mot. at 9 n.21. Movants further support this position by citing to various courts who have quoted Powell's concurring opinion when referencing the holding of the *Branzburg* Court. *See, e.g., Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981). This Court disagrees with that position. As Special Counsel points out "Justice Powell's concurring opinion is not a separate opinion concurring only in the judgement. Justice Powell was one of five Justices joining Justice White's opinion for the court, so Justice White's opinion is a majority opinion and not a plurality opinion." Gov't Opp'n to Cooper at 8 n.1. More importantly, it is the view of this Court that Powell's concurrence is entirely consistent with the holding of the majority in *Branzburg*.

In his concurrence, Justice Powell elaborates on the Court's statement that grand juries brought in bad faith may not harass members of the press. He clarifies that if the reporter has any reason to believe that "his testimony implicates confidential source relationship without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered. The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *Branzburg* 408 U.S. at 710 (Powell, J., concurring). This Court holds that the balancing test Justice Powell refers to should only be undertaken when a reporter is asked to testify before a grand jury "without a legitimate need of law enforcement." *Id.* "The balancing of interests suggested by Justice Powell is in the limited circumstances he mentioned, where there is, in effect, an abuse of the grand jury function. If Justice Powell's concurrence is read more broadly, it would be inconsistent with Justice White's opinion with which he concurred." *In re Grand Jury Proceedings*, 5 F.3d 397, 401 (9th Cir. 1993). This reading is further supported by the fact that Justice Powell explicitly rejects the qualified privilege advocated by the dissent. *Branzburg* at 710n.*. Although Justice Powell does refer to the necessity of a proper balance of the societal interests involved, "it is clear that he is actually referring to the availability of judicial case-by-case screening out for Bad faith 'improper and prejudicial' interrogation. Indeed this court has already so interpreted Justice Powell's opinion in *In re Possible Violations of 371, 641, 1503*, 184 U.S.App.D.C. 82, 564 F.2d 567 (1977)." *Reporters Comm. for Freedom of Press* v. *American Telephone & Telegraph Co.*, 593 F.2d 1030, 1061 n.107 (D.C. Cir. 1978); *see also In re Grand Jury Proceedings*, 810 F.2d 580, 585 (6th Cir. 1987) ("Justice Powell's concurring opinion is entirely consistent with the majority opinion, and neither limits nor expands upon its holding, but that, instead, it responds to what Justice Powell perceived as an unwarranted

characterization of that holding by Justice Stewart."); *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 14 (D.D.C. 1996) ("[T]his Court finds that Justice Powell's concurring opinion is consistent with Justice White's majority opinion in *Branzburg*. Both opinions found that no testimonial privilege exists for newsmen which does not exist for other citizens.").

Only two federal circuits courts have directly addressed the issue of a reporter's privilege in the grand jury context, and both of those courts held that there was no privilege. *See In re Grand Jury Proceedings, Storer Communications, Inc.*, 810 F.2d 580 (6th Cir. 1987); *Lewis* v. *United States*, 517 F.2d 236 (9th Cir. 1975)). One district court held that there is a common law qualified newsman's privilege in the grand jury context. *In re Grand Jury Subpoena of Williams*, 766 F. Supp. 358 (W.D. Pa. 1991) *aff'd*, 963 F.2d 567 (3rd Cir. 1992) (en banc) (dispositive order without discussion of merits).[1] This Court declines to follow that case "on the ground that it directly conflicts with the Supreme Court's holding in *Branzburg*." *In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993). Other circuits have demonstrated adherence to *Branzburg*'s assertion that there is no reporter's privilege except in the face of a grand jury acting in bad faith. *See In re Grand Jury Proceedings*, 5 F.3d 397, 401-03 (9th Cir. 1993) (court denied motion to quash a subpoena served on a "scholar" based on the reasoning of *Branzburg* holding there is no privilege in the absence of bad faith); *In re Grand Jury 87-3 Subpoena Duces Tecum*, 955 F.2d 229, 232-34 (4th Cir. 1992) (subpoena seeking corporate records upheld after applying *Branzburg* standard); *United States* v.

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[1] The *Williams* court supported its holding by explaining that the adoption of Federal Rule of Evidence 501 required privileges to be governed by the principles of common law. It then applied a reporters privilege which the Third Circuit had created in *a civil* case to the grand jury context. 766 F. Supp. at 367-68. This Court finds that the application of a reporters privilege applicable in the civil context to a case involving a grand jury subpoena is flawed and directly inconsistent with the Supreme Court's holding in *Branzburg*.

Smith, 135 F.3d 963, 968-70 (5th Cir. 1998) (reporters subpoenaed and not protected from the subpoena based on *Branzburg* analysis).

The Circuit Court for the District of Columbia has upheld the holding of *Branzburg*. *Reporters Comm. for Freedom of Press* v. *American Telephone & Telegraph Co.*, 593 F.2d 1030, 1061 (D.C. Cir. 1978) ("The Court in *Branzburg* determined that Good faith criminal investigation interests Always override a journalist's interest in preserving the secrecy of his sources."); *In re Possible Violations of 18 U.S.C. 371, 641, 1503*, 564 F.2d 567, 571 (D.C. Cir. 1977) (concluding that *Branzburg* established a "newsman can claim no general immunity, qualified or otherwise, from grand jury questioning. On the contrary, like all other witnesses, he must appear and normally must answer. If the grand jury's questions are put in bad faith or for the purpose of harassment, he can call on the courts for protection."). The D.C. District court has followed suit. *In re Grand Jury 65-1*, 59 F. Supp. 2d 1, 10-15 (D.D.C. 1996) (adopting *Branzburg*'s holding and analysis in rejecting journalist's motion to quash a grand jury subpoena).

It is true that some courts have chipped away at the holding of *Branzburg* by ruling that a court shall apply a qualified privilege in certain limited contexts. These courts have done so by carving out various factual scenarios different than those presented in *Branzburg* and announcing that a judge should apply a balancing test. *United States* v. *Ahn*, 231 F.3d 26 (D.C. Cir. 2000) (criminal case addressing "breach of contract" issue); *United States* v. *LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988) (pre-trial criminal proceeding); *United States*v. *Burke*, 700 F.2d 70 (2d Cir. 1983) (criminal trial); *Zerilli* v. *Smith*, 656 F.2d 705 (D.C. Cir. 1981) (civil proceeding); *United States* v. *Hubbard*, 493 F. Supp. 202 (D.D.C. 1979) (criminal case); *Carey* v. *Hume*, 492 F.2d 631 (D.C. Cir. 1974) (civil proceeding); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972) (civil action). In all of those cases noted by the petitioner, there was no Supreme Court precedent for the factual situation they were faced with indicating how they must rule. This court

does not share that luxury. Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong. The facts of this case fall entirely within that core—a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection. In the three decades since that opinion was penned, the Supreme Court has chosen not to issue a ruling contradicting that holding. Therefore, neither shall this Court.

Petitioner Russert attempts one last time to steer the court away from the inevitable holding in *Branzburg* by arguing that the case did not deal with confidential sources and that other courts have identified confidential sources as unique situations. (Russert Tr. at 15-20.) Russert argues that the relevant distinction is not between grand juries and all other judicial proceedings. Rather, petitioner submits, the relevant distinction is between cases when the government seeks to question a journalist about a confidential source and "those cases—like *Branzburg*—in which a journalist, like any other citizen, is obliged to testify about criminal conduct that he observed." Reply Memorandum of Points and Authorities in Support of NonParty Tim Russert's Motion to Quash Grand Jury Subpoena at 5. "This Court agrees with the Independent Counsel that the line should be drawn at the nature of the proceeding; not depending on how the reporter obtained the information at issue." *In re Grand Jury 95-1*, 59 F. Supp. 2d 1, 13 (D.D.C. 1996). Petitioner's interpretation of *Branzburg* is again inaccurate. Although some of the reporters in *Branzburg* did observe criminal conduct, one of the reporters did not observe any criminal conduct and was asked to testify about information he had learned from confidential sources. *Branzburg* 408 U.S. at 672-73. More importantly, the entire *Branzburg* opinion is laced with references to confidential sources and Justice White makes clear that the "heart of the [reporters'] claim is that the burden on news gathering resulting from compelling reporters to disclose confidential information outweighs any public interest in obtaining the information." *Id.* at 681. The *Branzburg* opinion's hold-

ing that there is no First Amendment or common law reporters privilege in the grand-jury context plainly encompasses journalists asked to reveal confidential sources and information.

Two other arguments proffered by the movants merit a response. First, movants point to the District of Columbia Shield Law, D.C. Code Ann. §§ 16-4702 - 4703 (2001), as a secondary basis for the Court to quash the journalists' subpoenas. The Court disagrees. The federal law of privilege exclusively governs evidentiary privileges in cases arising under federal substantive law in federal court. Fed. R. Evid. 501. "Whatever may be its force in the context of a civil common law action in a court of the District of Columbia . . . the D.C. statute is inapplicable here. Congress has never enacted a federal counterpart to the D.C. Shield Law." *Lee* v. *United States Dep't of Justice*, 287 F. Supp 2d 15, 17 (D.D.C. 2003). Second, Cooper and Russert assert that the subpoenas must be quashed because the Department of Justice Guidelines for issuing subpoenas to news media ("DOJ guidelines") were not met. 26 C.F.R. § 50.10. This Court is not convinced that the DOJ guidelines vest any right whatsoever in movants.[2] Assuming, *arguendo*, that the DOJ guidelines did vest a right in the movants in these cases, this Court holds that the DOJ guidelines are fully satisfied by the facts of this case as presented to the court in the *ex parte* affidavit of Patrick Fitzgerald. Furthermore, assuming *arguendo* that this Court were to determine that the journalists did possess a qualified privilege—a holding which this Court has explained is simply not supported by case law—the *ex parte* affidavit has also established that Special Counsel would be able to meet even the most stringent of balancing tests. The information

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[2] See 28 C.F.R. § 50.10(n) ("The principles set forth in this section are not intended to create or recognize any legally enforceable right in any person."); *In re Grand Jury Subpoena Am. Broad. Cos., Inc.*, 947 F. Supp. 1314, 1322 (E.D. Ark. 1996) (denying television network's request to quash grand jury subpoena on the basis that DOJ guidelines were not fulfilled because DOJ "regulations, by their own terms, confer no enforceable right on the subpoenaed person.").

requested from Mr. Cooper and Mr. Russert is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt. To be clear, this Court holds that Cooper and Russert have no privilege, qualified or otherwise, excusing them from testifying before the grand jury in this matter. There have been no allegations whatsoever that this grand jury is acting in bad faith or with the purpose of harassing these two journalist. Therefore, under the holding in *Branzburg* and its progeny, Mr. Cooper and Mr. Russert must fulfill their obligation, shared by all citizens, to answer a valid subpoena issued to them by a grand jury acting in good faith. An appropriate order will accompany this opinion.

July 20, 2004

/s/ Thomas F. Hogan
Thomas F. Hogan
Chief Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed April 19, 2005

No. 04-3138

In re: Grand Jury Subpoena, Judith Miller

Consolidated with 04-3139, 04-3140

Appeals from the United States District Court
for the District of Columbia
(Nos. 04mc00407, 04mc00460, 04mc00461)

On Appellants' Petition for Rehearing En Banc

Before: GINSBURG, *Chief Judge*; and EDWARDS, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL,* GARLAND,"** and ROBERTS,"** *Circuit Judges*

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* A separate statement of *Circuit Judge* TATEL concurring in the denial of the rehearing en banc is attached.

** *Circuit Judges* GARLAND and ROBERTS did not participate in this matter.

ORDER

Appellants' petition for rehearing en banc, the response thereto, and the brief of amici curiae in support of appellants have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular, active service did not vote in favor of the petition. Upon consideration of the foregoing and the emergency motion for expedited consideration of the petition for rehearing en banc, it is

ORDERED that the petition for rehearing en banc be denied. It is

FURTHER ORDERED that the emergency motion for expedited consideration of the petition for rehearing en banc be dismissed as moot.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY: /s/ Deputy Clerk
Deputy Clerk

TATEL, *Circuit Judge*, concurring in the denial of rehearing en banc: Although en banc review is "not favored," Fed. R. App. P. 35(a), and although all three panel members agreed on the result in this case—*i.e.*, that two subpoenaed reporters can be compelled to give grand jury testimony—petitioners seek reconsideration of three issues: their assertion of a common law privilege under Federal Rule of Evidence 501; their claim to First Amendment protection; and their due process challenge to the district court's use of ex parte evidence.

Regarding the common law issue, while I believe that "reason and experience," Fed. R. Evid. 501, support a qualified privilege for reporters' confidential sources, *see In re Grand Jury Subpoena, Judith Miller*, 397 F.3d 964, 989 (D.C. Cir. 2005) (Tatel, J., concurring), I concur in the court's denial of en banc review. Judge Henderson's opinion—which, as the narrowest supporting the result, is the controlling decision of the court—determined neither whether any common law privilege exists nor what standard would govern its application if it did. *See id.* at 981-82 (Henderson, J., concurring); *see also id.* at 976-77 (Sentelle, J., concurring); *id.* at 989-91 (Tatel, J., concurring). Hence, future panels of this court remain free to recognize any privilege (or no privilege) consistent with the result in this case, and those panels may, as necessary, clarify the standards governing reporter-source relationships. Given that the panel here agreed unanimously on the result, this particular case presents no question of "exceptional importance" in the sense required by our rule on en banc review. Fed. R. App. P. 35(a)(2).

En banc review is likewise unnecessary with respect to the First Amendment issue. True, this court's decisions interpreting *Branzburg v. Hayes*, 408 U.S. 665 (1972), are somewhat conflicted. For example, we have stated in civil litigation that "[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems," *Zerilli v. Smith*, 656 F.2d 705, 710 (D.C. Cir. 1981), while maintaining with respect to grand juries that "[a] newsman can claim no general immunity, qualified or otherwise," unless "questions are put in bad faith for the purpose of harassment," *In re Possible Vio-*

lations of 18 U S C. 371, 641, 1503, 564 F.2d 567, 571 (D.C. Cir. 1977). But factual similarities between this case and *Branzburg* prevent this court from recognizing a First Amendment privilege here. *See In re Grand Jury Subpoena*, 397 F.3d at 988 (Tatel, J., concurring). Only the Supreme Court can limit or distinguish *Branzburg* on these facts.

Finally, petitioners offer no compelling reason to reconsider the panel's ruling on the due process issue. Claiming a right to review evidence used to find them in contempt, petitioners object to the district court's and panel's reliance on ex parte submissions to determine that any conceivable privilege was overcome. But barring an absolute privilege—something no federal common law decision endorses and that *Branzburg* forecloses as a First Amendment matter—reporters either enjoy no privilege, in which case compelling their testimony requires no evidence at all, or they hold a qualified privilege, that is, a privilege subject to exceptions, much like the crime-fraud exception to the attorney-client privilege, *see, e.g.*, *United States* v. *Zolin*, 491 U.S. 554, 563 (1989), and the imminent-harm exception for psychotherapist-patient communications, see *Jaffee v. Redmond*, 518 U.S. 1, 18 n. 19 (1996). If the privilege is qualified, then ex parte review, far from violating due process, affords a critical protection to journalists: it permits the court to demand a detailed showing by the government that it has satisfied the criteria for overcoming the privilege.

I certainly understand petitioners' preference for reviewing the evidence themselves, but given the " 'indispensable secrecy of grand jury proceedings,' " *United States v. R Enterprises, Inc.*, 498 U.S. 292, 299 (1991) (quoting *United States v. Johnson*, 319 U.S. 503, 513 (1943)), it can hardly represent an abuse of discretion for the district court to deny them that option. Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong

guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth. *See generally In re Grand Jury Subpoena*, 397 F.3d at 973-74 (discussing reasons for grand jury secrecy). Accordingly, we have approved of ex parte review in applying the crime-fraud exception to the attorney-client privilege—a context precisely analogous to application of a qualified reporter privilege. *See id.* at 1002 (Tatel, J., concurring) (citing *In re Sealed Case No. 983077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)).

Attempting to manufacture a circuit conflict on this issue, petitioners cite language in *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973), and *In the Matter of Kitchen*, 706 F.2d 1266 (2d Cir. 1983), contemplating an "uninhibited adversary hearing" in civil contempt proceedings. *See Alter*, 482 F.2d at 1024; *Kitchen*, 706 F.2d at 1272. Yet neither case remotely resembles this one. *Alter* dealt with alleged illegal surveillance of discussions between a grand jury witness and his attorney, a matter requiring no review of secret grand jury materials, *see* 482 F.2d at 1024-25, and *Kitchen* involved contempt findings based on the alleged implausibility of a witness's claimed failure of memory—a situation more akin to punishment for perjury than evaluation of a privilege claim, *see Kitchen*, 706 F.2d at 1272 (identifying a need for "heightened" procedural protection "[w]hen a case is in the grey area between contempt and perjury"). Nor do petitioners' other authorities involve compulsion of testimony due to failure of an asserted privilege. While expressing caution regarding use of secret evidence, they deal, respectively, with retraction of security clearance, punishment for false testimony, and denial of visas. *See Greene v. McElroy*, 360 U.S. 474 (1959); *In re Oliver*, 333 U.S. 257 (1948); *Abourezk v. Reagan*, 785 F.2d 1043 (D.C. Cir. 1986), *affd by an equally divided court*, 484 U.S. 1 (1987). Unlike in those cases, the disputed evidence here relates to the government's conduct of its investigation, not the witness's own conduct. Moreover, again unlike in those cases, the reporters here face only a coercive penalty, not punishment for past actions. To avoid incarceration, they need not persuade the district judge that any

accusation against them is false; they need only abandon their unlawful resistence and testify before the grand jury. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 828 (1994).

The better analogy is *R. Enterprises*, where the Supreme Court approved of ex parte proceedings to determine the reasonableness of grand jury subpoenas. Although denial of a reasonableness-based motion to quash may expose witnesses to coercive measures (including incarceration) no less than denial of a claimed privilege, the Court observed that "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *R. Enterprises*, 498 U.S. at 302; *cf. Abourezk*, 785 F.2d at 1061 (describing in camera review of subpoenaed evidence "for the limited purpose of determining whether the asserted privilege is genuinely applicable" as a "notabl[e]" exception to the rule against secret evidence).

In short, because none of petitioners' claims meets our high standard for reconsideration by the *en banc* court, I join in denying their petition.

U.S. Constitution, Amendment I

The First Amendment to the United States Constitution provides, in relevant part, that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."

U.S. Constitution, Amendment V

The Fifth Amendment to the United States Constitution provides, in relevant part, that:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

28 U.S.C. § 1826 (2000)

28 U.S.C. § 1826 provides in pertinent part that:

"(a) Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information, including any book, paper, document, record, recording or other material, the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall exceed the life of—

(1) the court proceeding, or

(2) the term of the grand jury, including extensions,

before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed eighteen months. . . ."

Federal Rules of Evidence
Rule 501

Federal Rule of Evidence 501 provides that:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

Federal Rules of Criminal Procedure
Rule 17

Federal Rule of Criminal Procedure 17 provides in pertinent part that:

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

. . .

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

. . .

(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. § 636(e).

. . .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL*

Case No. Misc. ____ (TFH)

In re SPECIAL COUNSEL INVESTIGATION,
In re GRAND JURY SUBPOENAS TO JUDITH MILLER

AFFIDAVIT OF JUDITH MILLER

STATE OF NEW YORK)
: ss.:
COUNTY OF QUEENS)

JUDITH MILLER, being first duly sworn, deposes and says:

1. I am a correspondent at *The New York Times* ("*The Times*"). I write about national security matters with special emphasis on terrorism, the Middle East and weapons of mass destruction. I have spent my career working as an investigative journalist.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

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* This affidavit was unsealed by order of the district court.

3. I joined *The Times*' Washington Bureau in 1977, covering the securities industry, Congress, politics, foreign affairs (particularly the Middle East) and nuclear proliferation issues. Since that time I have served as Cairo, Egypt bureau chief, deputy Washington bureau chief, news editor, Paris correspondent, special correspondent to the Persian Gulf crisis and Sunday Magazine special correspondent. I have written four books, including books covering Saddam Hussein and the spread of Islamic extremism. I shared a Pulitzer Prize for a series of articles published in The Times in January 2001 on the threat posed by international terrorists, including Osama bin Laden and Al Qaeda.

4. I understand that I have been served, through my counsel, with grand jury subpoenas demanding that I testify and produce documents in connection with a special investigation into the identity of an unnamed government source (or sources) who allegedly leaked Valerie Plame's identity as a covert CIA official in the summer of 2003 after her husband, former Ambassador Joseph Wilson, had authored an op-ed piece in *The Times*. Those subpoenas are attached hereto as Exhibits A and B, respectively. I understand that an assistant to the Special Counsel leading this investigation has indicated to my counsel that his office seeks to question me before the grand jury about communications that I had with a specifically identified confidential source.

5. I have never written an article about Valerie Plame or Joe Wilson. I did however contemplate writing one or more articles in July 2003, about issues related to Ambassador Wilson's op-ed piece. In preparation for those articles, I spoke and/or met with several potential sources. One or more of those potential sources insisted as a precondition to providing information to me, that I agree to maintain the confidentiality of their identity.

6. I cannot testify about any communications I may have had with the individual identified by the Office of Special Counsel or produce any responsive documents such as the materials

set forth in paragraph one of the document subpoena served by the Special Counsel, which include my reporter's notes. I do not have and did not receive any documents responsive to paragraph two of the document subpoena.

7. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about the identity or nature of conversations with confidential sources would seriously impede the ability of all reporters to gather and report the news. This is particularly true in the case of reporting that involves intelligence and national security issues, where decisions made almost always behind close doors often have a profound, far-reaching effect on the life of a nation and its people. In the wake of 9/11, and even before it, the government has dramatically increased the kind and amount of information that is non-public or classified as secret, and the penalties for unauthorized disclosure of such information are increasingly severe.

8. People with access to non-public or classified information think long and hard about sharing with journalists their grievances and concerns, even if their conversations do not involve the discussion of such information. Increasingly, they do so only with journalists they trust to keep their identities, as well as the material they discuss, confidential. Such "whistle blowing" is vital both to a free press and to our democracy as it has evolved.

9. As a reporter who was embedded during the recent Gulf war with one of the most sensitive army units responsible for hunting for weapons of mass destruction, I was given access to secret information involving intelligence sources and methods. This experience gave me a new appreciation for the importance of protecting such information. But it also renewed my conviction that a free press remains one of the country's safeguards against the abuse of such information by those who possess it.

10. Over the years, I have written or contributed to innumerable articles that have been based on information received from confidential sources at the highest levels of our govern-

ment. Among them, for example, is a series of articles published in The Times during January 2001 about the threat posed by international terrorists, including Osama bin Laden and Al Qaeda, for which I shared a Pulitzer Prize. The Al Qaeda series revealed a great deal of information about a serious and looming threat which, at the time, had gone largely unnoticed by many in the American public and other mainstream media. True an correct copies of the articles in the Al Qaeda series are attached hereto as Exhibit C.

11. I also relied to a considerable degree on confidential information provided by senior government officials for my book, *Germs*, which was published in early September 2001. The book, which I co-wrote with two other investigative journalists, discusses the real and serious threat presented by germ warfare and provides an inside look into how germ warfare had been waged. I believe that *Germs* not only raised the public's awareness surrounding the threat of germ warfare, but also brought to public light startling revelations about the actions of the United States and foreign governments in the production, testing and handling of germ-based weapons.

12. Without the benefit of information from confidential sources who spoke to me without fear of their identities being revealed, neither the Al Qaeda series, *Germs*, nor, for that matter the vast majority of stories I have written for *The Times*, could have ever been published.

13. I believe that compelling reporters to disclose their sources and violate pledges of confidentiality they have given them, virtually guarantees that what is often a channel of last resort will be closed. Potential crimes, abuses of power, manipulation of intelligence, and other wrongdoing may be covered up by the government-imposed secrecy that increasingly surrounds national security affairs.

14. This is particularly true in the case at issue, since I did not publish an article about Joe Wilson or his wife. Compelling me to disclose what I may have discussed with people to whom

I pledged confidentiality would not only render the pledges I gave them meaningless, it would make it virtually impossible for me to continue reporting in this most sensitive, but important, of government endeavors.

15. Compelling journalists to testify also creates the inevitable appearance that journalists either are, or can be readily converted into an investigative arm of the government. This would also seriously compromise the integrity and independence of the press, which is supposed to provide a check on potential abuses of power. People who would otherwise be willing to speak to me would surely refuse to do so if they perceive me to be a journalist who does not keep her word after promising a source confidentiality. I cannot violate this pledge and be true to my profession.

16. I join in the views expressed by Max Frankel, former Executive Editor of *The Times*, in an affidavit I understand was submitted by *The Times* during the course of the *Pentagon Papers* case more than thirty years ago:

> "We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as secrets—varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—Government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same Government, by the Congress and by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.
>
> The governmental, political and personal interests of the participants are inseparable in this process. Presidents make "secret" decisions only to reveal them for the pur-

poses of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor. The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the orders of those superiors. Though not the only vehicle for this traffic in secrets—the press is always eager to provide a forum—the press is probably the most important.

In the field of foreign affairs, only rarely does our Government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information bearing on foreign policy only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials from government to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called The Fourth Branch of Government."

The same remains true today. A copy of that affidavit is attached hereto as Exhibit D.

17. Finally, I understand that the person the Special Counsel's Office wishes to ask me about has signed some sort of widely-circulated form, drafted and presented to him by the Department of Justice, asking any journalist he has spoken with to cooperate with the government's investigation and not to assert any journalistic privilege. I do not find at all persuasive

the argument that any privilege I have not to testify about potential confidential sources is "waived" as a result of this signed form. Whatever may have been said publicly or privately within the government to any source of mine that may have cajoled him or her to sign the form prepared by the government—and I am aware of public statements of the President himself urging all officials to cooperate with the investigation—does not affect my promise of confidentiality to my sources in any way. I do not feel at all confident that such a form, presented to individuals by their employer (or here the Attorney General and tacitly even the President himself) is not signed under extraordinary pressure. Based on my experience as a journalist, I strongly believe that if the courts enforced use of such forms, it would deter confidential sources from coming forward and would substantially diminish the important information available to public.

18. I respectfully urge the Court to quash the subpoenas directed to me in their entirety.

/s/ Judith Miller
Judith Miller

Sworn to before me this
19th day of August, 2004

/s/ Notary Public
Notary Public

EXHIBIT A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Judith Miller

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:
☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Grand Jury 03-3

PLACE

United States District Courthouse
Third and Constitution Avenue, NW
Washington, DC 20001

COURTROOM

3rd Floor
GRAND JURY ROOMS

DATE AND TIME

August 20, 2004
@2:30 p.m.

YOU ARE ALSO COMMANDED to bring with you the following documents(s) or objects(s):

☐ *Please see additional information on reverse.*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT
Nancy M. Mayer-Whittington

(BY) DEPUTY CLERK

This subpoena is issued upon application of the United States of America

DATE

August 12, 2004

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Patrick J. Fitzgerald
Special Counsel
U.S. Department of Justice
Washington, D.C. 20005
202-514-1187

EXHIBIT B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

To: Judith Miller

SUBPOENA TO TESTIFY
BEFORE GRAND JURY

SUBPOENA FOR:
☐ PERSON ☒ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

Grand Jury 03-3

PLACE

United States District Courthouse
Third and Constitution Avenue, NW
Washington, DC 20001

COURTROOM

3rd Floor
GRAND JURY ROOMS

DATE AND TIME

August 20, 2004
@2:30 p.m.

YOU ARE ALSO COMMANDED to bring with you the following documents(s) or objects(s):

1. Any and all documents (including notes, e-mails, memos, or other documents) relating to any conversations, occurring from on or about July 6, 2003 to on or about July 13, 2003, between Judith Miller and a government official with whom she met in

Washington, D.C. on July 8, 2003, concerning Valerie Plame Wilson (whether referred to by name or by description as the wife of Ambasador Wilson) or concerning Iraqi efforts to obtain uranium, whether such conversation was on the record, off the record, on background, or on deep background, excepting any documents created specifically in preparation for litigation concerning this subpoena.

2. Any documents provided to Judith Miller by such government official on July 8, 2003.

In lieu of personal appearance before the grand jury, compliance with the subpoena may be made by providing the requested information to FBI Inspector John C. Eckenrode at 935 Pennsylvania Avenue, N.W., Room 7847, Washington, D.C. 20535. He may be contacted by telephone at 202-324-8220, or by fax at 202-324-0028.

☐ *Please see additional information on reverse.*

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

U.S. MAGISTRATE OR CLERK OF COURT
Nancy M. Mayer-Whittington

(BY) DEPUTY CLERK

This subpoena is issued upon application of the United States of America

DATE

August 14, 2004

NAME, ADDRESS AND PHONE NUMBER OF ASSISTANT U.S. ATTORNEY

Patrick J. Fitzgerald
Special Counsel
U.S. Department of Justice
Washington, D.C. 20005
202-514-1187

EXHIBIT C

January 14, 2001, Sunday

FOREIGN DESK

One Man and a Global Web of Violence
By Stephen Engelberg (Series)

In 1987, several years after he began training Arab volunteers to oust Soviet forces from Afghanistan, Osama bin Laden had a vision. The time had come, he told friends, to start a global jihad, or Islamic holy war, against the corrupt secular governments of the Muslim Middle East and the Western powers that supported them.

Mr. bin Laden, the Saudi millionaire, would use his camps in Afghanistan to take holy warriors from around the world—who had always pursued local goals—and shape them into an international network that would fight to bring all Muslims under a militant version of Islamic law.

Some of his comrades in arms warned him that the goal was unattainable.

"I talked to Osama one day and asked him what was he doing," recalled Abdullah Anas, an Algerian who was fighting in Afghanistan at the time and provided a rare personal narrative of the formation of Mr. bin Laden's organization. "'Imagine after five years a guy from Malaysia goes back to his country. How can he remember you are his leader? He will get married, have children, engage in work in his country. How can you establish one camp for jihad in the world?'"

But he and other doubters watched as Mr. bin Laden, who is now America's most wanted terror suspect, set about doing just that. Mr. Anas's account and those of other witnesses, along with intelligence from United States, the Middle East and Europe, draw a vivid and newly detailed portrait of the birth of a modern jihad movement. What began as a holy war against the Soviet Union took on a new dimension, Mr. Anas said, when

Mr. bin Laden broke away and established a new corps of militant Muslims whose ambitions reached far beyond the borders of Afghanistan.

From his Afghan camps, Mr. bin Laden created a kind of clearinghouse for Islamic terrorism, which American officials say not only conducts its own operations but trains and underwrites local militants, connecting home-grown plots to a global crusade.

His strategy is aptly captured by one of his many code names: The Contractor. The group he founded 13 years ago, Al Qaeda, Arabic for The Base, is led by masterful opportunists who tailor their roles to the moment, sometimes teaching the fine points of explosives, sometimes sending in their own operatives, sometimes simply supplying inspiration.

The group has become a beacon for Muslim Malaysians, Algerians, Filipinos, Palestinians, Egyptians, even Americans who have come to view the United States as their enemy, an imperial power propping up corrupt and godless governments. Mr. bin Laden has tried to bridge divisions in a movement long plagued by doctrinal, ethnic and geographic differences. "Local politics drives what they're doing, but it's much more visionary," said Robert Blitzer, a former F.B.I. counterterrorism official. "This is worldwide. This is, 'We want to be somewhere in a hundred years.'"

According to a recent Central Intelligence Agency analysis, Al Qaeda operates about a dozen Afghan camps that have trained as many as 5,000 militants, who in turn have created cells in 50 countries. Intelligence officials say the group is experimenting with chemical weapons, including nerve gas, at one of its camps.

Mr. bin Laden and his supporters use centuries-old interpretations of the Koran to justify violence in the name of God against fellow Muslims or bystanders—a vision on the farthest extremes of one of the world's largest religions. But their operations are

thoroughly modern—encrypted e-mail, bomb-making recipes stored on CD-ROM's, cell phones and satellite communications.

The group plans attacks months or years in advance, investigators say. A former United States Army sergeant, Ali A. Mohamed—who worked for Mr. bin Laden and is now a government witness—has told prosecutors that Al Qaeda trains "sleeper" agents, or "submarines," to live undetected among local populations.

Mr. bin Laden has not achieved his more ambitious goals. He has not brought more Muslims under the rule of Islamic law, toppled any of the Arab governments he took aim at, or driven the United States out of the Middle East. His violence has repulsed many believers and prompted severe crackdowns in Arab states that already have limited political freedoms.

Nonetheless, he and his small inner circle have preoccupied American officials, paralyzing embassies, thwarting military exercises and making Americans abroad feel anxious and vulnerable. Earlier this month, the United States closed its Rome embassy for nearly two days after intelligence officials warned of a possible attack.

American officials have charged Mr. bin Laden with masterminding the 1998 bombings of two embassies in Africa that killed more than 200 people, and suspect him of involvement in the October bombing of the destroyer Cole in Yemen, which killed 17 sailors. Four men went on trial this month in lower Manhattan in the African bombings.

American authorities are also examining Al Qaeda's role in three plots timed to millennium celebrations in 1999—attacks directed at another American ship, a so-far unknown target in the United States, and tourist sites and a hotel in Jordan.

Mr. bin Laden's group has recently attempted operations against Israel—a significant departure, American and Middle Eastern officials say. They acknowledge that he has ensured his organization's survival, in the event of his capture or death, by des-

ignating a successor: his longtime aide, Abdulaziz abu Sitta, an Egyptian known as Muhammad Atef or Abu Hoffs al-Masri. Last week, according to Al Jazeera, an Arab satellite channel, his son married Mr. Masri's daughter in Kandahar, Afghanistan.

"His arrest, which we dearly hope for, is only one step along the road of the many things we need to do to eliminate the network of organizations," said Richard A. Clarke, the top White House counterterrorism official.

The Cause
Afghan War Draws Young Arab Fighters

Al Qaeda grew out of the jihad inspired by Muslim scholars to combat the Soviet Union's 1979 invasion of Afghanistan. They issued religious rulings, known as fatwas, which exhorted Muslims everywhere to defend the Islamic land of Afghanistan from infidels. Over the next few years, several thousand young Arab men joined the Afghan resistance.

One of the first to answer the call was a young Algerian named Boujema Bounouar, who went by the nom de guerre Abdullah Anas. In recent interviews in London, where he now lives, Mr. Anas recounted how Mr. bin Laden went to Afghanistan to fight the Soviets and was drawn to a group of Egyptians who wanted to start a global jihad.

Mr. Anas, who is now a leader of an Algerian Islamic political party, is not a dispassionate observer. He acknowledges that he opposed Mr. bin Laden, whose program of terrorism, he says, has tarred the reputations of thousands of Arabs who fought honorably for the Afghan cause. But his firsthand account, which conforms with Western intelligence analysis, provides one of few portraits of Mr. bin Laden's evolution as a militant leader.

The two men were defined by many of the same forces. Mr. Anas said his journey from teacher of the Koran to holy warrior began in 1984, when he was 25 and living with his family in

Western Algeria. Visiting the local library, he read in a news weekly about a religious ruling that waging war against the Soviets was every Muslim's duty.

"After a few days, everyone heard about this fatwa and started talking," he recalled. "'Where is this Afghanistan? Which people are they? How can we go there? How much is the ticket?'"

That year, Mr. Anas was among the million Muslims who participated in the hajj, the annual pilgrimage to Mecca, Saudi Arabia. "You feel very holy," he said. "People from all over the world. From Zimbabwe to New Delhi. Everyone is wearing just two pieces of white cotton. Everybody. You can't describe who is the minister, who is the president. No jewelry. No good suit.'"

In Mecca, he said, prayer leaders spoke emotionally about the jihad in Afghanistan.

He was standing in the marble expanse of the Great Mosque with 50,000 others when, he said, a friend pointed out a radical Palestinian scholar who was organizing the Arab support for the Afghans. His name was Abdullah Azzam, and his writings, which would help spur the revival of the jihad movement in the 20th century, were just becoming widely known.

Mr. Anas introduced himself and asked whether the magazine article he had seen in the library was correct. Had the religious leaders agreed that fighting in Afghanistan was a duty of all Muslims?

He said, 'Yes, it's true.'"

"'O.K.,' I said. 'If I want to go to Afghanistan, what do I do now?'"

Mr. Azzam gave him a business card with a telephone number in Islamabad, Pakistan, where he was a university professor. A week later, Mr. Anas was on a flight from Saudi Arabia to Pakistan.

He had no idea where he was going, or what he would do. He dialed the only phone number he knew in Pakistan, reaching Mr. Azzam, who offered him a place to stay in his own house, a bustling salon frequented by students and scholars.

It was there that he first caught sight of Mr. Azzam's youngest daughter, whom he would marry five years later. And Mr. Azzam introduced him to a Saudi visitor identified in the traditional Arabic way, as Abu Abdullah, the father of his eldest son, Abdullah. The visitor was Osama bin Laden.

The two men exchanged pleasantries. Mr. bin Laden's name was well known. He was said to be the youngest of 24 brothers in a family that ran one of the largest construction companies in the Arab world.

Mr. bin Laden seemed no different from the other Arab volunteers who were starting to arrive in Pakistan, Mr. Anas recalled. The conversation turned to how the volunteers could help the Afghans win their jihad, and teach them more about Islam.

The Soviet forces had a considerable advantage in the Afghan conflict. Their helicopter gunships controlled the air, and their troops held the main roads. But the rebels had powerful friends. The United States and Saudi Arabia were spending millions funneling arms to the Afghans through Pakistan's intelligence service.

Mr. Anas began by teaching the Koran to the Afghan rebels, who did not speak Arabic and learned the verses by rote. He also led prayers at a "guest house" set up in Pakistan for Arab volunteers. At the time, he said, there were no more than a few dozen Arabs in the country, working with the rebels. None spoke the Afghan languages.

After a few months, Mr. Anas said, he trekked into Afghanistan to join a combat unit, one of three Arabs traveling with a caravan of 600 Afghan soldiers. He learned Farsi and took on the role of mediator, traveling among the feuding rebel camps. He spent most of each year inside Afghanistan.

Mr. Anas became a top aide to Commander Ahmed Shah Massoud, whose troops controlled northern Afghanistan and are now fighting the Taliban rulers—who support Mr. bin Laden.

Like many Muslims who joined the rebels, Mr. Anas expected to die in the Afghan jihad and earn the special status designated in the Koran for martyrs, which includes forgiveness of sins and the enjoyment in Paradise of beautiful virgins. "It's not the main idea to be a shahid," or martyr, he said. "But it's part of my plan."

In the mid-1980's, American and Middle Eastern intelligence officials say, Mr. bin Laden moved to Peshawar, a Pakistani city near the border with Afghanistan. The city was a staging ground for the war against the Soviets; American, French and Pakistani intelligence officers intrigued and competed there to manipulate the Afghan cause to their countries' advantage.

Mr. bin Laden's fortune of several hundred million dollars gained him immediate popularity.

"He was one of the guys who came to jihad in Afghanistan," Mr. Anas said. "But unlike the others, what he had was a lot of money. He's not very sophisticated politically or organizationally. But he's an activist with great imagination. He ate very little. He slept very little. Very generous. He'd give you his clothes. He'd give you his money."

Mr. Anas, who returned annually to Pakistan from the Afghan battlefields to visit with Mr. Azzam, said Mr. bin Laden at first slept in the guest house in Peshawar on a cushion on the floor. He recalled that Mr. Azzam liked to say: "You see, this man has everything in his country. You see he lives with all the poor people in this room."

At about this time, in 1984, Mr. Azzam set up the organization that would play a pivotal role in the global jihad over the next decade. It was called the Makhtab al Khadimat, the Office of Services, and its goal was to recruit and train Muslim volunteers for the Afghan fronts. Mr. Azzam raised money for the orga-

nization in countries overseas including the United States and gave impassioned speeches promoting the Afghan cause. Mr. bin Laden embraced the idea from its inception and became Mr. Azzam's partner, providing financial support and handling military affairs.

Mr. bin Laden worked best with small groups, Mr. Anas said. "When you sit with Osama, you don't want to leave the meeting," he said. "You wish to continue talking to him because he is very calm, very fluent."

A main goal of the Office of Services, Mr. Anas said, was to prevent the increasing number of outside volunteers from taking sides in the rebels' factional struggles. "We are in Afghanistan to help the jihad and all the Afghan people," Mr. Azzam told him.

But there was increasing frustration from many of the disaffected young Muslims over Mr. Azzam's insistence that the Office of Services support only the Afghan cause—when many were agitated about the plight of their own homelands. Some approached Mr. bin Laden.

"They told him: 'You shouldn't be staying with Abdullah Azzam. He doesn't do anything about the regimes—Saudi, Egyptian, Algerian. He's just talking about Afghanistan,'" Mr. Anas said.

"These people are always saying to Osama: 'You should establish something. Have a clear idea to use these people after Afghanistan for other wars.'"

Among those most ardently courting Mr. bin Laden was a group of Egyptian radicals called the Egyptian Islamic Jihad, which helped assassinate President Anwar el-Sadat in 1981.

The Egyptian group advocated the overthrow of governments by terrorism and violence, and one of its key figures, Ayman al-Zawahiri, had taken shelter in Afghanistan. Mr. Anas said—and Western intelligence agencies agree—that Dr. Zawahiri was a

commanding early influence on Mr. bin Laden. Today he is part of Al Qaeda's leadership, according to intelligence officials.

But Mr. Azzam quarreled bitterly with the Egyptians.

Mr. Anas said he once witnessed a heated argument between Mr. Azzam and Sheik Omar Abdel Rahman, a radical religious scholar, who argued that the flouting of Islamic law had turned Presidents Mohammed Zia ul-Haq of Pakistan and Hosni Mubarak of Egypt into infidels who could therefore be killed. Sheik Abdel Rahman later moved to Brooklyn, where he was associated with an Office of Services branch. In 1995 he was convicted of plotting to blow up New York landmarks.

In 1986, according to Mr. Anas and Middle Eastern intelligence officials, Mr. bin Laden began to chart a separate course. He established his own training camp for Persian Gulf Arabs, a group of about 50 who lived in tents set apart from the other Afghan fighters. He called the camp Al Masadah—The Lion's Den.

Within little more than a year the movement divided, as Mr. bin Laden and the Egyptians founded Al Qaeda—the "base" for what they hoped would be a global crusade.

Mr. Anas said Mr. Azzam confided to him that Egyptian ideologues had wooed Mr. bin Laden away, gaining access to his money. "He told me one time: 'I'm very upset about Osama. This heaven-sent man, like an angel. I am worried about his future if he stays with these people.'"

The differences between Mr. Azzam and Mr. bin Laden were largely tactical, Mr. Anas said, noting that the two men remained friends.

A committed enemy of Israel, Mr. Azzam believed the Arab warriors should focus on creating an Islamic state in Afghanistan, a process that could take decades. Mr. bin Laden, according to Mr. Anas, came to believe that such a war could be fought in many countries simultaneously.

"The arguments were very secret," Mr. Anas said. "Only three to four people knew about them at the time." Mr. Azzam saw little difference between the United States and the Soviet Union, contending in his articles and speeches that both were hostile to Islam. But Mr. Azzam opposed terrorism against the West, Mr. Anas said.

By the late 1980's, Peshawar had become a magnet for disaffected young Muslims who shared Mr. bin Laden's views. "Ten people would open a guest house and start issuing fatwas," Mr. Anas recalled. "'We are going to make revolution in Jordan, in Egypt, in Syria.' And they haven't got any contact with the real jihad in Afghanistan."

The tide of the Afghan war was turning. Stinger missiles, provided through the American covert program, had forced Soviet aircraft to fly far above the battlefields. Afghanistan had become Moscow's Vietnam. By February 1989, the Soviets had withdrawn.

A C.I.A. official said that the agency, aware of the changing nature of the jihad, had taken some steps he would not specify to counter the threat. But Milt Bearden, the former C.I.A. station chief in Islamabad, who coordinated the agency's anti-Soviet effort in Afghanistan, disagreed.

"The Soviet Union, armed to the teeth, was falling apart," he said. "A shooting war then erupted in the Persian Gulf. Afghanistan was off the front burner."

When the war ended, he said, "we got the hell out of there."

The Afghan rebels' war continued, first against the Soviet-backed government and then within their own ranks. On Nov. 24, 1989, Mr. Azzam and two sons were killed by a car bomb in Peshawar as they drove to Friday Prayers. The murders were never solved.

Mr. Anas said he tried to take over leadership of the Office of Services. According to the C.I.A., the group split; the extremist faction took control, siding with Mr. bin Laden.

"They loved the ideas of Osama and the person of Abdullah Azzam," Mr. Anas said wistfully. "They don't love me."

The Base
From Many Lands, Under One Banner

Fired by their triumph over the Soviets, the Arabs who had fought in Afghanistan returned home, eager to apply the principles of jihad to their native lands.

The Koran sets strict limits on when and how holy war is to be undertaken. But Gilles Kepel, a leading French scholar of contemporary Islam, said the Afghan veterans were guided by their own radical interpretation of sacred Muslim texts. "Intoxicated by the Muslim victory in Afghanistan," he said, "they believed that it could be replicated elsewhere—that the whole world was ripe for jihad, which is contrary to Islamic tradition."

They called themselves the Arab Afghans.

In Jordan some founded a group, Jaish Muhammad, that officials say took aim at King Hussein, whose family claims descent from the Prophet Muhammad.

In Algeria, the Arab Afghans were among the founders of the Armed Islamic Group, the most radical to emerge after the military government canceled the 1991 elections. Known by its French initials, G.I.A, it began by blowing up military targets and escalated to wholesale massacres of Algerians who did not believe in the jihad.

According to Mr. Anas, one of its founding members was an Algerian who had initially fought with him in Afghanistan but joined Al Qaeda in the late 1980's. Mr. Anas says he has been told that Mr. bin Laden provided some of the seed money for the G.I.A.

The early 1990's proved difficult for Mr. bin Laden. He was enraged by King Fahd's decision to let American troops wage the Persian Gulf war from Saudi Arabia, site of the two holiest shrines in Islam. He began to focus his wrath on the United States and the Saudi government. After the conflict ended, he moved to Afghanistan.

But his stay was brief. Within months he fled, telling associates that Saudi Arabia had hired the Pakistani intelligence service to kill him. There is no confirmation that such a plot existed. Nonetheless, in 1991, Mr. bin Laden moved to Sudan, where a militantly Islamic government had taken power.

Over the next five years, Mr. bin Laden built a group that combined legitimate business with support for world holy war.

He also set out to accomplish his overriding goal of gathering the leading Islamic extremist groups under one banner. According to Middle Eastern officials, Mr. bin Laden and his envoys met with radicals from Pakistan and Egypt to propose an international Islamic front, led by Afghan veterans, that would fight Americans and Jews.

Al Qaeda began training its own operatives. Ali Mohamed, the government witness, who has said he arranged Mr. bin Laden's move to Sudan, told investigators that he taught group members about weapons, explosives, kidnapping, urban fighting, counterintelligence and other tactics at camps in Afghanistan and Sudan. He said he showed some of the trainees how to set up cells "that could be used in operations."

The dispatch of American troops to Somalia in late 1992 and 1993 as part of a United Nations mission was another affront to Mr. bin Laden. The Bush administration presented it as a relief operation.

American officials say a defector from Al Qaeda told them it viewed the deployment as a dangerous expansion of American influence in the region and a step toward undermining the Islamic government of Sudan.

Al Qaeda privately issued fatwas that directed members to attack American soldiers in Saudi Arabia, Yemen and the Horn of Africa, according to American prosecutors. They said he also sent his military chief, an Egyptian who had been with him at the formation of Al Qaeda, to find the vulnerabilities of United Nations forces in Africa.

Al Qaeda created a cell in Kenya as a "gateway" to its operations in Somalia, the prosecutors assert. Members of the group blended into Kenyan society, opening legitimate businesses that sold fish and dealt in diamonds, and operating an Islamic charity.

Federal prosecutors say at least five group members crossed the border to Somalia, where they trained some of the fighters involved in an Oct. 3, 1993, battle with United States special forces that left 18 Americans and several hundred Somalis dead.

The battle, one of the most widely publicized setbacks for American forces in recent memory, cast a shadow over every subsequent Clinton administration debate on the possible uses of ground troops. American intelligence did not learn of Al Qaeda's role in the ambush until several years later.

Prosecutors say the group also considered attacking Americans in Kenya to retaliate for the Somalia mission. Mr. Mohamed testified that Mr. bin Laden sent him to Nairobi in late 1993 to look over possible American, French, British and Israeli targets for a bomb attack, including the American Embassy. He said he took photos, drew diagrams and wrote a report, which he delivered to his boss in Khartoum. "Bin Laden looked at the picture of the American Embassy and pointed to where a truck could go as a suicide bomber," he said.

American prosecutors say Al Qaeda had more grandiose plans: a leading member, an Iraqi who Mr. Anas said had first gravitated to Mr. bin Laden in Afghanistan, tried to buy enriched uranium in Europe.

The Iraqi, Mahdouh Mahmud Salim, forged links between Mr. bin Laden's group and others supported by Iran. Mr. Salim met with an Iranian religious official in Khartoum, and soon afterward, the prosecutors say, Al Qaeda members got training from Hezbollah, the Iranian-backed Shiite group in Lebanon skilled in making car bombs. American officials said this alliance was notable because it marked the first time radicals from the minority Shiite branch of Islam collaborated with extremists from the dominant Sunni branch.

Mr. bin Laden's business ventures in Sudan—including a tannery, a transportation company and a construction concern—raised money and served as cover for the travels of Mr. Salim and others, according to American officials. They said that his companies cornered Sudan's exports of gum, sunflower and sesame products—and that he invested $50 million of his family money in a new Islamic bank in Khartoum.

The Network
As in Afghanistan, So in the World

The new jihad movement was fueled by the civil war that consumed Afghanistan in the early 1990's. The training camps that had once schooled soldiers to battle the Soviet enemy now attracted militants more interested in fomenting holy war back home—in America, Europe or the Middle East—than in the struggle for control of Afghanistan.

The Office of Services, the Pakistan-based group founded in the 1980's by Mr. Azzam to recruit soldiers for the anti-Soviet cause, arranged the travels of some of these new jihadists, according to European and American officials.

Many of those associated with the office, Mr. Anas said, shared Mr. bin Laden's vision of a global movement. American officials suspect they were acting under his instructions, though this remains a subject of debate among intelligence analysts.

American investigators stumbled across the first signs of the new global phenomenon in 1993, when they began to examine the bombing at the World Trade Center.

They discovered that the four men who carried out the attack, which killed 6 and wounded more than 1,000, had ties to Sheik Omar Abdel Rahman, whom they charged with leading a worldwide "jihad organization" that had begun plotting to kill Americans as early as 1989.

Mr. Abdel Rahman was later convicted of conspiring to blow up New York landmarks, including the United Nations. But in the years since, American intelligence officials have come to believe that he and the World Trade Center bombers had ties to Al Qaeda.

The evidence is suggestive, but not conclusive. Several of those convicted in the World Trade Center case were associated with the Brooklyn refugee center that was a branch of the Office of Services, the Pakistan-based organization that Mr. bin Laden helped finance and lead. The Brooklyn center was headed for a time by Mustafa Shalabi, an Egyptian murdered in 1991 in a case that remains unsolved. Federal prosecutors recently disclosed that it was Mr. Shalabi whom Mr. bin Laden called in 1991 when he needed help moving to Sudan, according to Mr. Mohamed, the federal witness.

One of the men convicted of bombing the World Trade Center, Ahmad M. Ajaj, spent four months in Pakistan in 1992, returning to the United States with a bomb manual later seized by the United States government. An English translation of the document, entered into evidence in the World Trade Center trial, said that the manual was dated 1982, that it had been published in Amman, Jordan, and that it carried a heading on the front and succeeding pages: The Basic Rule.

Those appear to be errors. Two separate translations of the document, one done at the request of The New York Times, show that the heading said Al Qaeda—which translates as The Base,

the name of Mr. bin Laden's group. In addition, the document lists a publication date of 1989, a year after Mr. bin Laden founded his organization. And the place of publication is Afghanistan, not Jordan.

Steven Emerson, a terrorism expert who first pointed out the errors, said they deprived investigators of a subtle early clue to the existence of Mr. bin Laden's group.

While the trade center trial ended in 1994, federal prosecutors did not open their grand jury investigation of Mr. bin Laden and Al Qaeda until 1996.

"Had the government correctly translated the material," Mr. Emerson said, "it might have understood that the men who blew up the World Trade Center and Mr. bin Laden's group were linked."

Asked about the mistranslation, an official in the United States Attorney's office, who declined to be identified, said only that Mr. Ajaj had been carrying "voluminous material printed by various organizations." He added that their titles referred to international conspiracy, commando operations and engineering of explosives.

The jihad movement also took root in Europe. In August 1994, three young French Muslims of North African descent, wearing hoods and brandishing machine pistols, opened fire on tourists in a hotel lobby in Marrakesh, Morocco, killing two Spaniards and wounding a third. The French police investigating the attack learned that it had been planned by two Moroccan veterans of the Afghan war, who had recruited commandos for the attack in Paris and Orleans and sent more than a dozen of them to Afghanistan for training.

The indoctrination of the young Muslims began with religion, according to French court papers and testimony. An Orleans mathematics professor and interpreter of the Koran, Mohamed Zinedine, gathered around him a group of men from the slums of Orleans who wanted to learn how to pray. Later, French court

papers say, he instructed them in the concept of waging jihad against corrupt governments, saying it was a higher stage of Islamic observance.

One young Moroccan testified that Mr. Zinedine—who is now a fugitive—showed him a videotape of Muslim victims of "torture in Bosnia, of babies with their throats cut, of pregnant women disemboweled, and fingernails torn off." The young man added, "He told me there was a way of helping them and that I must help them." Prayers for people like the Muslims in Bosnia, he quoted Mr. Zinedine as saying, were not enough. He must become an "armed humanitarian."

European investigators tracing the Afghan network in France, Belgium and Germany found records of phone calls between local extremists and the Office of Services in Pakistan. In March 1995, Belgian investigators came across another clue: A CD-ROM in the car of another Algerian, who had been trained in Afghanistan in 1992 and was part of the G.I.A. cell in Brussels. The CD was initially ignored, Belgian officials say.

Months later, the Belgians began translating its contents and discovered several different versions of a manual for terrorism that had begun circulating among Islamic militants in the early 1990's. The voluminous manual covered diverse subjects, from "psychological war in Islam" to "the organizational structure of Israeli intelligence" to "recruiting according to the American method."

The manual also offered detailed recipes for making bombs, including instructions on when to shake the chemicals and how to use a wristwatch as a detonator. In addition there were instructions on how to kill with toxins, gases and drugs. The preface included a dedication to the new hero of the holy war: Osama bin Laden. Versions of the manual circulated widely and were seized by the police all over Europe.

Reuel Gerecht, a former C.I.A. official, said he was told that the agency did not obtain its own copy of the manual before the end

of 1999. "The truth is," he said, "they missed for years the largest terrorist guide ever written." The omission, he asserted, reflects the agency's reluctance to scrutinize the fallout from its support of the anti-Soviet jihad.

A C.I.A. official said that the agency had had "access to versions" of the manual since the late 1980's. "It's not the Holy Grail that Gerecht reports it to be," he said, adding that the terrorist-related parts were fairly recent additions.

By the mid-1990's, American officials had begun to focus on Mr. bin Laden and his entourage in Sudan. They saw him as the embodiment of a dangerous new development: a stateless sponsor of terrorism who was using his personal fortune—which one Middle Eastern official estimated at $270 million—to bankroll extremist causes.

American officials pressed Sudan to eject Mr. bin Laden, and in 1996 they succeeded, forcing him into exile. It was a diplomatic triumph, but one that many American officials would come to rue. Mr. bin Laden made his way back to Afghanistan, where a new group of young Islamic militants, the Taliban, was taking control. American and Middle Eastern officials said some of the cash that the Taliban used to buy off local warlords came from Mr. bin Laden. Soon the new, hard-line rulers of Afghanistan allowed him to use their country to pursue his goal of creating "one jihad camp for the world," as Mr. Anas put it.

The Edict
A Sacred Muslim Duty To Kill All Foes

Two years after he arrived in Afghanistan, in February 1998, Mr. bin Laden publicly announced his intentions. At a camp in Khost, in eastern Afghanistan, he and several other leaders of militant groups declared that they had founded the International Islamic Front for Jihad Against Jews and Crusaders, an umbrella entity that included Al Qaeda and groups from Egypt, Pakistan and Bangladesh, among others.

The front issued the following fatwa: "To kill Americans and their allies, both civil and military, is an individual duty of every Muslim who is able, in any country where this is possible."

On Aug. 7, 1998, eight years to the day after the first American troops set foot in Saudi Arabia, Mr. bin Laden delivered on the threat, American prosecutors say. Bombs exploded hours apart at the American Embassies in Kenya and Tanzania.

The plot, as described by federal prosecutors, was truly international. Prosecutors assert that the attacks were carried out by Muslims from Tanzania, Saudi Arabia and Jordan, most of whom were trained in Afghanistan. The Kenyan plotters, they say, spoke directly with Mr. bin Laden by satellite telephone as they developed their plans.

The attacks were costly for Al Qaeda. Less than two weeks after the embassy bombings, the United States conducted air strikes against Mr. bin Laden's camps in Afghanistan. Over the next two years, police and intelligence agencies around the world, many prodded by the United States, arrested more than 100 militants in some 20 countries.

Almost every month, authorities detain or question people with ties to Al Qaeda. Late last year, in what American officials described as one of the more alarming cases, the Kuwaiti police arrested a local man, an Afghan veteran, who said he was associated with Mr. bin Laden's group and planning to bomb American and Kuwaiti targets. American officials say he ultimately led the police to a weapons cache of almost 300 pounds of explosives and more than 1,400 detonators.

And in addition to the two-day closure of the American Embassy in Rome, officials say, recent warnings of a possible Al Qaeda attack prompted the United States to divert an entire carrier battle group scheduled to dock in Naples.

American officials acknowledge that Al Qaeda and Mr. bin Laden have proven resourceful, resilient adversaries. Much of his personal wealth has now been spent, or is in bank accounts

that are now frozen. But officials say he is raising money through a network of charities and businesses. His group reconstitutes its networks in many countries as quickly as they are disrupted.

And failure can breed success. In late 1999, American officials say, a group of Yemenis botched an attempt to blow up an American ship, The Sullivans, as it passed through Yemen. Their boat, loaded with explosives, sank a few feet off shore.

This year, American officials say, a Saudi operative of Mr. bin Laden's who helped organize that attack worked with some of the same people on the bombing of the Cole in Yemen.

Internal crackdowns on Muslim militants, like the Algerian government's largely successful attempts to stamp out the G.I.A. in the mid-1990's, have in several instances fueled the international jihad.

American officials said the most radical Algerians were now collaborating with Mr. bin Laden. In 1999, Algerians were for the first time implicated in plots against the United States, when Ahmed Ressam was arrested crossing the border from Canada with a carload of explosives. Mr. Ressam goes on trial later this year in Los Angeles.

American and Middle Eastern officials say Al Qaeda has now expanded its jihad to include Israel, which until recently had regarded Mr. bin Laden as an American problem. The officials say Al Qaeda has financed and trained an anti-Israel group, Asbat al Ansar, that operates from a Palestinian refugee camp in Lebanon.

Last June, Israel charged in a sealed indictment that a Hamas member who was plotting to attack targets within Israel, including settlers and the army, had been trained in one of Mr. bin Laden's Afghan camps. "Al Qaeda wants in on the action—the new intifada against Israel," said one American official.

Olivier Roy, a French scholar who follows Islamic activities, says Al Qaeda's biggest asset is the thousands of jihadists around the world who no longer see their struggle in strictly local or even national terms, which makes them impervious to normal political or military pressure.

Mr. bin Laden's actions, he said, are "not the continuation of politics by other means."

"Osama bin Laden doesn't want to negotiate."

Holy Warriors

TODAY—The making of an Islamic terror network.

MONDAY—A look inside a plot that could have crippled Jordan's capital.

TUESDAY—What motivates the jihad's young recruits.

CAPTIONS: Photos: An Arab channel said this image showed Osama bin Laden, right, and his son Muhammad at the son's wedding last week to the daughter of Abu Hoffs al-Masri, left, Mr. bin Laden's designated successor. (Al Jazeera Television via Associated Press)(pg. 1); ABDULLAH AZZAM—A Palestinian scholar who drew young Arabs to help Afghanistan's Muslims expel the Soviets, he opposed further broadening the jihad and was killed by a car bomb. (Steven Emerson); ABDULLAH ANAS—"How can you establish one camp for jihad in the world?" this Algerian fighter once asked Osama bin Laden in Afghanistan. He then watched Mr. bin Laden do just that. (Jonathan Player for The New York Times); (Agence-France Presse)(pg. 16); The Minds Behind the Jihad—OSAMA BIN LADEN—The man whose version of a worldwide jihad resulted in the founding of Al Qaeda. (Associated Press); ABU ZUBAYDAH—A key Al Qaeda aide responsible for contacts with non-Afghan Islamic militant groups; AYMAN AL-ZAWAHIRI—An Egyptian physician responsible for military operations who was an early influence on Mr. bin Laden; ABU HOFFS AL-MASRI—An Islamic law expert designated to suc-

ceed Mr. bin Laden as Al Qaeda's leader should he be captured or killed; (Agence France-Presse)(pg. 17)

Chart: "An Empire of Violence
War, terrorism and the world of Osama bin Laden.

1979: Soviet troops invade Afghanistan; local Muslims declare a "jihad," which the U.S. and Saudi Arabia later support, against the invaders.

1981: President Anwar el-Sadat of Egypt is assassinated; Muslim militants are charged.

1984: The Office of Services is founded by Abdullah Azzam, a Jordanian militant, to recruit and support the jihadists.

1984: Osama bin Laden moves from Saudi Arabia to Pakistan to help Azzam establish training camps across the border of Afghanistan.

1986: Bin Laden founds Al Masadah, a training camp for Arabs from the Gulf states.

1988: Bin Laden establishes Al Qaeda, a group to promote the jihad.

1989: The Soviet Union withdraws from Afghanistan. The United States closes its embassy. Afghans get an interim government.

Bin Laden returns to Saudi Arabia to join his family construction company.

Azzam is killed by a car bomb; the Office of Services splits; its extremist faction join Al Qaeda.

1990-1991: The United States sends forces to Saudi Arabia to drive Iraq out of Kuwait, starting the gulf war.

Infuriated by an American presence near Islamic holy sites, bin Laden moves to Sudan, relocating Al Qaeda headquarters.

1992: The Algerian Army cancels final parliamentary elections. Armed Islamic groups seeking to overthrow the government set off civil war.

The United States sends troops to Somalia for a U.N. relief mission.

Al Qaeda issues proclamations that U.S. forces in Saudi Arabia, Yemen and the Horn of Africa, including Somalia, should be attacked.

Civil war grips Afghanistan.

1993: A bomb explodes at the World Trade Center, killing six. Links to the Office of Services and Al Qaeda emerge but do not lead to charges.

1993: Somali tribesmen trained by Al Qaeda, U.S. prosecutors say, attack the U.N. relief operation, killing 18 Americans.

1994: The Taliban emerge as a force in Afghanistan's civil war.

Saudi Arabia strips bin Laden of citizenship; his family disavows him.

Explosions in the Paris Metro that kill eight are traced to Algerian militants trained in Afghanistan.

1995: A car bomb explodes in Riyadh, killing five Americans and two Indians. Four Saudis are beheaded after confessing, saying they were inspired by bin Laden.

1996: Sudan, pressed by the United States, evicts bin Laden, who relocates to Afghanistan.

1996: A truck bomb explodes at the Khobar Towers in Dhahran, Saudi Arabia. Nineteen American soldiers are killed.

1998: The International Islamic Front for Jihad Against Jews and Crusaders, an umbrella for international militant groups organized by bin Laden, issues its first formal religious order: It is the individual duty of Muslims to kill Americans, including civilians, anywhere possible.

American Embassies in Kenya (right) and Tanzania are bombed, killing more than 200 people. The United States bombs sites in Sudan and Afghanistan in retaliation.

Bin Laden is indicted on charges of complicity in the bombings; $5 million is offered for his capture.

1999: Jordan announces that it has foiled an Al Qaeda-linked plot to bomb tourist sites in Amman during the millennium celebrations.

The United States arrests Ahmed Ressam at a customs check point at Port Angeles, Wash., driving a rented car with a cache of explosives.

2000: The destroyer Cole is bombed in Aden harbor, Yemen, killing 17 sailors. Investigators link the explosion to bin Laden.

Ali Mohammed, a former U.S. Army sergeant, pleads guilty to participating in a conspiracy initiated by bin Laden to bomb the embassies in East Africa.

2001: Jury selection for trial of four charged in the embassy bombings begins in Federal District Court in Manhattan. [ ] U.S. Army sergeant, pleads guilty to participating in a conspiracy initiated by bin Laden to bomb the embassies in East Africa.

2001: Jury selection for trial of four charged in the embassy bombings begins in Federal District Court in Manhattan. (pg. 16-17)

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January 15, 2001, Monday

FOREIGN DESK

Dissecting a Terror Plot From Boston to Amman
By Judith Miller (Series)

After weeks of advanced training in explosives at one of Osama bin Laden's Afghan camps, Raed Hijazi, a onetime Boston cab driver, was ready for his mission. The chemicals for the explosives were stockpiled. The targets were selected, the homemade detonators wired.

Western officials say Mr. Hijazi, an American citizen of Palestinian origin who has since been arrested, recently described for Jordanian investigators the moment that followed: his induction by one of Mr. bin Laden's chief lieutenants into Al Qaeda, the group that Mr. bin Laden, a Saudi-born multimillionaire, founded 13 years ago to wage jihad, or holy war, throughout the world.

Mr. Hijazi told investigators that he had been given a piece of paper and had recited the words on it: "In the name of God the Merciful, the Compassionate. I promise to ally myself to Osama bin Laden for the sake of God."

It was late November 1999, and Mr. Hijazi was about to go from Afghanistan to Jordan where, Jordanian investigators say, he was planning to carry out what would be a devastating terrorist act: the killing of hundreds of Americans, Israelis and others who were visiting Jordan to celebrate the dawn of the millennium. Initial targets, Jordanian officials say, included the fully booked 400-room Radisson Hotel in downtown Amman, two Christian holy sites and two border crossings into Israel.

Under the plan, a second wave of attacks would follow.

Mr. Hijazi never reached Jordan. The Jordanians say they foiled the plot, arresting more than a dozen local militants. One by one, prosecutors said, the detainees described a conspiracy that

had been years in the making and, until the bin Laden group's help in its late stages, mostly home-grown.

Jordanian and American officials say what nearly happened in Jordan is a case study of how Osama bin Laden and his deputies, isolated in Afghanistan, greatly extend their reach by aiding locally initiated terrorism.

The Jordanian plotters dreamed of striking a blow for Islam, and they financed their local cell, the authorities said, through the sale of forged documents, robberies and Mr. Hijazi's savings in Boston. Jordanian officials said the men had traveled to Lebanon and Syria to buy weapons, get military training and stockpile chemicals for explosives.

But according to Jordanian and American officials, their plans gained powerful support from Mr. bin Laden's Al Qaeda, which trained Mr. Hijazi in explosives, approved the targets chosen by the local cell, set the timing and blessed the operation as its own.

"If you want to understand the modern face of global Islamic terrorism and how it functions, look at Jordan," said Richard A. Clarke, the White House's senior counterterrorism official. "The Jordan plot is the template."

During the Jordanian trial last year, the defendants protested their innocence and said they had been tortured into confessing, an assertion that Jordan vehemently denies. In September a military court convicted 22 of the 28 men charged, sentencing 6 to death, including Mr. Hijazi, who was then still at large, and the man the Jordanians say inducted him into Al Qaeda.

In October, Mr. Hijazi was arrested in Syria and sent to Jordan, where this month he is to be retried on the same charges. His lawyer, Jalal Darwish, said Mr. Hijazi was not guilty and would be proven so in the new trial.

But Jordanian and American officials said Mr. Hijazi had given them new information about the plot and about its ties to Al

Qaeda, including the account of his initiation, some of which came from Western officials familiar with his statements.

The American authorities, who get significant amounts of intelligence about Arab militants from Jordan, say they are persuaded that the Jordanians' account of a deadly plot is accurate.

A portrait of modern terrorism emerges in unusual detail from the confessions of those charged; the prosecutors' statement in court; and interviews in Jordan with investigators, two of the defendants, their families, friends and foreign officials.

The version offered by prosecutors and the court record has inconsistencies. Some of the defendants' statements are contradictory or vague. But the record suggests that the Jordanians were eager to join forces with Mr. bin Laden's group, which shared their vision of replacing secular governments with, as they define it, truly Islamic states.

Mr. Hijazi appreciated the mutual advantages of such assistance. When the attacks were completed, he boasted to the other plotters, according to accounts of their confessions, "there won't be enough body bags in all of Jordan to hold the dead."

The Plot

A Long Trail In Several Countries

Jordanian prosecutors trace the plot's origins to May 1996, when Mr. Hijazi met Khadar abu Hoshar, a longtime foe of the Jordanian government, at a Palestinian refugee camp in Syria.

The two Palestinians were natural allies despite their different backgrounds. Mr. abu Hoshar, now 36, had fought with the Afghan rebels against Soviet forces in the late 1980's. Seared by the experience, he had returned home with a passion for Islamic fundamentalism and the conviction that even superpowers could be defeated by true believers.

"When I arrived back in Jordan, the intifada was at its peak," Mr. abu Hoshar said in an interview in prison late last fall. "The

thinking about the fighting in both places was the same: Everyone in the world thought that powers like Russia which occupy Muslim land can only be removed from the land through force."

Mr. Hijazi, now 32, shared that conviction. Born in California to relative privilege, he had grown up mostly in Saudi Arabia and Jordan. He told prosecutors that he had been converted to the Islamic cause while studying business at California State University in Sacramento. Mr. Hijazi began attending a mosque and cultural group in Sacramento called the Islamic Assistance Organization. It was there, he told Jordanian investigators, that he met a Muslim from the Fiji Islands who schooled him in radical Islamic philososophy and persuaded him to go to Afghanistan.

The mosque, he told investigators, helped arrange his training at the Khaldan camp near Khost in eastern Afghanistan. Mr. Hijazi proved an excellent student, especially with mortars, a favorite weapon of the Afghans. He became known by his noms de guerre, Abu Ahmed the Mortarman and Abu Ahmed the American, according to Mr. abu Hoshar's statement to the prosecutors.

When the two men met in 1996 at the Yarmuk Palestinian refugee camp, a state-controlled camp in Syria, prosecutors say, Mr. abu Hoshar was trying to found a Jordan-based group of militants.

Mr. Hijazi had his own ideas about how to bring the jihad home. A burly, intensely suspicious man, Mr. Hijazi revealed little about himself. Accompanied at the refugee camp by his younger brother, Saad, prosecutors say, he was introduced to Mr. abu Hoshar only by his noms de guerre.

Although the two worked together closely during the next three years, Mr. abu Hoshar told investigators that he had never learned his associate's true name, and had not known that the younger man accompanying him that day in Syria was his brother.

According to the prosecutor, Mr. abu Hoshar and the Hijazi brothers discussed "the issue of jihad while agreeing on the necessity of training on rifles and explosives." Their intent, the prosecutor's statement continues, was "to carry out terrorist attacks against the Jews and American interests in Jordan."

Their plans suffered an early setback at the end of 1996, when the Jordanian authorities arrested Mr. abu Hoshar as he entered his homeland from Syria. He was jailed for 18 months.

In early 1997, Mr. Hijazi moved to Boston, where he had a friend from his years in Afghanistan. He has told Jordanian interrogators that he took a job driving a taxi to raise money for his military activities back home. He got a taxi license, records show, and drove for the Boston Cab Company. Prosecutors say he sent a total of $13,000 to his cell in Jordan.

The plot, Jordanian prosecutors say, appears to have resumed in earnest in 1998, soon after Mr. abu Hoshar's release from prison. According to the prosecutors, he and Mr. Hijazi, who traveled between Jordan, Boston, Turkey, Syria and many other places, recruited at least 10 others.

It was at this point, prosecutors say, that they made a crucial connection.

Mr. abu Hoshar asked an Algerian member of his group, Hussein Turi, if he knew anyone in Al Qaeda who could arrange training in Afghanistan for his cell. Mr. Turi told investigators that he had sent a message through an intermediary to Abu Zubaydah, the bin Laden aide responsible for contacts with Islamic militant groups around the world.

Abu Zubaydah was the nom de guerre for Zein al-Abideen Muhammad Hassan, a 27-year-old Palestinian and former Afghanistan veteran who had risen quickly in Al Qaeda's ranks. Middle Eastern and American officials describe him as a pivotal figure in the bin Laden network, a trusted militant who assigned candidates screened at his Peshawar, Pakistan, guest house to

the dozen or so Afghan camps financed and run by Mr. bin Laden.

According to Col. Mahmoud Obeidat, the Jordanian chief prosecutor, Abu Zubaydah was a crucial link between local initiative and central command.

Abu Zubaydah sent back a fax to Mr. abu Hoshar, setting the rules for his dealings with the Jordanian cell, Mr. Turi said. Contacts with him must always be made through one person, who must vouch for those sent to be trained. No one should be coerced into a mission. And those sent to Afghanistan through Pakistan must never call him from the airport or their hotel. The cell readily agreed to the conditions.

With the training arranged, the plotters began to focus on the most difficult aspect of their mission: securing the explosives and detonators for their bombs.

In late 1998, Mr. Hijazi abruptly left Boston, leaving unclaimed his $150 deposit on his cab, a spokesman for the Boston Cab Company said. Using his American passport, he went to London and bought five Al Bico two-way radios at an electronics shop on Edgewater Road. The radios can be converted into remote-control detonators, investigators said.

Traveling to Jordan via Israel, prosecutors said, Mr. Hijazi chose a route through the Arava crossing, which allowed him to look over the border post there as a possible target.

He then began buying the acids and agricultural chemicals needed to produce powerful explosives. Using a forged Jordanian gold dealer's license, prosecutors said, he gradually accumulated sulfuric acid and 5,200 pounds of nitric acid, a substance that cannot be bought in Jordan without such a permit. When properly mixed, the chemicals can produce an explosive more powerful than TNT.

The group also rented a house in Marka, a poor suburb of Amman, and one of its members, skilled in construction, dug a

large hole in the basement to hide the chemicals. The concealed chamber was more than 9 feet deep and 45 feet wide, bigger than the house's foundation. The chamber took two months to build, according to a statement from the cell member who built it, a Jordanian who had befriended Mr. Hijazi in Afghanistan in the early 1990's.

The group began experimenting with explosives. Following instructions on a computer disk that contained a 10-volume, 5,000-page guerrilla manual, the Encyclopedia of Afghan Jihad, Mr. Hijazi prepared samples on his family's farm about an hour's drive from Amman, his brother Saad told the police.

In June 1999, Mr. abu Hoshar told the police, he called Abu Zubaydah in Pakistan, using a cell phone as instructed, and said he was sending Mr. Hijazi and three others to Afghanistan for training.

The four men traveled to Turkey, each by a different route, to avoid detection. Then, together, they went on to Pakistan and into neighboring Afghanistan. Mr. Hijazi has told Jordanian prosecutors that he went to a camp operated by Mr. bin Laden that specializes in advanced explosives training. He also visited Kabul, where, he said, he met other members of Al Qaeda.

When his training was over in late November, Mr. Hijazi told investigators, Abu Zubaydah met with him privately to give him the oath of allegiance. Abu Zubaydah told him that from then on, he was authorized to act in Mr. bin Laden's name "anywhere in jihad territories."

He then traveled to Syria. Prosecutors say he planned to enter Jordan on Dec. 6, accompanied by three suicide bombers who would attack the border crossings and a Christian baptism site. The prosecutors said the plotters knew that the sites would be thronged "in light of the approaching millennium festivals."

It was also a religiously propitious moment for such an attack. Ramadan, the Muslim holy month of dawn-to-dusk fasting,

began on Dec. 9. Under Islamic tradition, anyone martyred during that time is promised a prominent place in paradise.

In the early morning of Nov. 30, Abu Zubaydah called Mr. abu Hoshar. "The training is over," he said, according to Mr. abu Hoshar's statement.

The Investigation
Preventing a Disaster On Millennium Day

The phone call came as no surprise to Jordanian officials. A year earlier, in 1998, Jordan's intelligence service had picked up a vague but menacing tip that Mr. bin Laden's group might be planning an operation somewhere in the region, perhaps Israel, perhaps Jordan.

The Jordanians now suspect that Mr. bin Laden's group might have gotten involved in the plot as part of its determination to retaliate for the worldwide crackdowns that followed the 1998 bombings of two American Embassies in Africa.

By the summer of 1999, investigators had determined that the plot was in fact aimed at Jordan. They began watching suspects, some of whom they knew only by sight.

The Jordanians were listening on Nov. 30 as Abu Zubaydah gave the orders to begin carrying out the plot, which he referred to as "al yom alfieh," or the day of the millennium. "We knew we could wait no longer," said Colonel Obeidat, the Jordanian chief prosecutor.

At 2 a.m. on Nov. 30, police squads raided several houses they had put under surveillance, arresting 16 people, among them Mr. abu Hoshar. He said later that he was on the phone with Abu Zubaydah when the raid began.

The Jordanian authorities said they had immediately began to question the suspects. Among the first to talk was Hussein Turi, the Algerian, who had a French passport.

Mr. Turi eventually disclosed that he was Algerian and that his passport was forged, the prosecutors said. He also told them that he had hidden material for the plot in his home in the Weidhat refugee camp in Amman.

Another suspect, Osama Sumar, who had built the underground storage chamber, disclosed the existence and location of a second safe house. On Dec. 5 at 2 a.m., the police raided the building, No. 24, a nondescript two-story house on a quiet street in the Marka neighborhood. In a convertible sofa in a small room on the first floor, the police said, they found fake Saudi passports and a book in English that they later learned Mr. Hijazi had brought with him from the United States. It was a how-to manual on disguises and altering one's appearance.

When they picked up a stereo and shook it, they heard a strange rattle. Inside were the five remote-control devices that Mr. Hijazi had bought in London.

On the far side of the room, the police said, was a freshly plastered strip of wall that appeared to cover what had been a long crack. But they could not find the storage chamber or any trace of the explosives that Mr. Sumar had described.

Two hours later, the police returned to the house, this time accompanied by Mr. Sumar, whom they had roused from his prison bed. "He took us in and pointed to a section of the floor," one policeman recalled. Four square cinder blocks had been perfectly cast to resemble the rest of the blocks on the floor, but they covered an iron hatch. Attached to its far side was a ladder leading into a basement chamber.

"When we opened the hatch, we couldn't believe it," said Kamel al-Naj, an explosives expert who accompanied the police that night and testified at the trial. "The smell was so foul we could hardly breathe. It burned my esophagus."

The chamber, its walls covered with thick plastic sheets, contained 71 large containers of acid, some dark green and some white. The dark green plastic containers held nitric acid; the

white containers were filled with sulfuric acid. Several were leaking. The floor of the hidden chamber was two inches deep in flammable liquid.

"Only an hour before," Mr. Naj exclaimed, "we had all been walking around the house smoking! The house could have blown sky high had one of us dropped a match."

Attorneys for the defendants said the acids were intended to make fertilizer for the Hijazi family farm, but Mr. Naj disputed that assertion. He said he saw only one practical purpose for chemicals of that kind: to make explosives. And he estimated that the plotters had enough explosive ingredients to make the equivalent of 16 tons of TNT, which would flatten not only the Radisson but entire neighborhoods.

Other defendants, learning that Mr. Turi and another plotter had begun talking, also began to confess. Investigators found out that the group had planned a second wave of bombings against landmarks in Amman, including an airport in Marka and the Citadel, the popular tourist site that includes the Temple of Hercules, the Omayyad Palace and a celebrated Byzantine church.

Colonel Obeidat, the military prosecutor, said the attack would have been "the worst terrorist incident ever in Jordanian history."

Mr. Hijazi's lawyer said the convictions would be overturned. The defendants, he noted, were all acquitted of charges of belonging to Al Qaeda under a law that requires prosecutors to show that the group has a formal structure and membership on Jordanian soil.

Mr. Hijazi's father, Muhammad, said in an interview in Amman late last fall that both his sons were innocent. Interviewed by telephone last week, Mr. Hijazi asserted that Raed had been tortured into confessing.

Raed, Mr. Hijazi said, had gone to America to begin a new life that his wife and three children in Amman would some day join.

"What kind of anti-American terrorist," he said, "wants to move his wife and children to the United States?"

Holy Warriors

SUNDAY—The making of an Islamic terror network.

TODAY—A look inside a plot that could have crippled Jordan's capital.

TUESDAY—What motivates the jihad's young recruits.

CAPTIONS: Photos: The house in a suburb of Amman where bomb-making chemicals were stored by convicted plotters who included, from top, Raed Hijazi, Osama Sumar and Saad Hijazi. (Judith Miller/The New York Times)(pg. 1 A1); TARGETS—The plotters chose sites visited by American Christian pilgrims: Mount Nebo in Jordan, left, where Moses is said to have died, and a Jordan River baptism site. (Photographs by Reuters/Corbis); HOME—A scene from the Weidhat refugee camp in Amman, where one of the suspects lived and stored materials. (Mohamed el-Dakhakny/Mideast Photo Agency)(pg. 1 A6)

Chart: "Thwarted Terror"

According to Jordanian prosecutors, terrorist plans to bomb Israeli border crossings and tourist sites in Jordan were blessed by Osama bin Laden's Al Qaeda organization. Twenty-two men were convicted for their roles in the aborted bombings. (pg. A6)

Map of Jordan and Israel shows the locations of sites targeted to be bombed. (pg. A6)

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January 16, 2001, Tuesday

FOREIGN DESK

Killing for the Glory of God, In a Land Far From Home
By Judith Miller (Series)

PANJSHIR VALLEY, Afghanistan—Muhammad Khaled Mihraban, a polite, soft-spoken 26-year-old Pakistani, thinks he has already killed at least 100 people. Maybe more; he isn't really sure.

"My goal was not to kill," he said. "But I had a line to follow, an Islamic ideal. I knew that Muslims needed their own country, a real Islamic country."

Mr. Mihraban found that country when he came to Afghanistan in 1992. Having decided "to consecrate my life to jihad" while studying Islamic law at Punjab University in Lahore, he said, he joined a Pakistani militant group that was fighting India in the disputed province of Kashmir. His training took place in Afghanistan.

"We learned how to plant mines, how to make bombs using dynamite and how to kill someone quietly," he recalled.

A gifted student, he was soon asked to train others in group camps near Khost. "But I wanted to act, not teach," he explained. So after a stint waging war in Kashmir, he returned to Kabul to fight alongside the Taliban forces that control most of the country.

Mr. Mihraban, who was captured by the rebels fighting the Taliban in northern Afghanistan, said in an interview in a bleak prison that if he were released, he would "stay right here and fight again for Kabul." If he were asked to do so, he said, he would go to London, Paris or New York and blow up women and children for Islam. "Yes, I would do it," he said quietly, without hesitation.

If the international terrorism that has haunted Americans for the last decade has a home, it is Afghanistan, the place that comes

closest to the extremists' ideal of a state ruled by the strict code of Islamic law.

Afghanistan is an inspiration, an essential base of operations, a reservoir of potential suicide bombers and a battle front where crucial ties are forged. It is also, American officials say, where Osama bin Laden is experimenting with chemical weapons.

Participants in nearly every plot against the United States and its allies during the last decade have learned the arts of war and explosives in Afghan camps, authorities say, including the defendants in the 1998 bombings of two American Embassies in East Africa.

The Central Intelligence Agency estimates that as many as 50,000 to 70,000 militants from 55 countries have trained here in recent years. The agency says the Taliban permit a wide range of groups to operate in Afghan territory, from the Pakistani militants who trained Mr. Mihraban to Mr. bin Laden's organization Al Qaeda (Arabic for The Base). Middle East officials said that as many as 5,000 recruits have passed through Mr. bin Laden's camps.

American and Middle Eastern intelligence officials believe that Mr. bin Laden maintains a network of a dozen camps in Afghanistan that offer training in small arms and in explosives and logistics for terrorist attacks. The officials said the embassy bombings, which killed more than 200 people, were rehearsed on a model built to scale at one of Mr. bin Laden's Afghan camps.

One camp, according to those officials, is educating a new generation of recruits in the uses of chemicals, poisons and toxins.

Within the last year, trainees at the camp, which is called Abu Khabab, have experimented on dogs, rabbits and other animals with nerve gases, the officials said. Recruits have also fashioned bombs made from commercially available chemicals and poisons, which have been tried out on animals tethered to outdoor posts on the camp test range, according to surveillance photographs and informers' reports.

"The role of Afghanistan is now absolutely clear," said Michael A. Sheehan, the former coordinator of the State Department's Office of Counterterrorism, who in late December became assistant secretary general for peacekeeping operations for the United Nations. "Every Islamic militant we've looked at goes scurrying back there for sanctuary. Afghanistan, and to a lesser extent Iran, are the only major sanctuaries left."

The Training
Where Recruits Study Tactics and Explosives

Middle Eastern officials estimate that in the last six months, more than 100 men recruited by Mr. bin Laden's and affiliated groups have been trained at the camp, which is named after the Egyptian militant who runs it, Midhat Mursi—whose nom de guerre is Abu Khabab.

The camp is part of a large complex of such training sites known as Darunta, about eight miles from Jalalabad, an Afghan eastern provincial capital, down a dusty road that runs atop an old stone dam of the same name. According to Western and Middle Eastern officials, a cache of chemicals is stored in the reinforced caves of nearby mountains and naturally protected underground tunnels.

Abu Khabab's graduates in the last year include Raed Hijazi, the Jordanian-American whom Jordan has convicted in absentia as a ringleader of the failed plot to attack tourists in Amman during the millennium celebrations.

Mr. Hijazi, whom the Syrians arrested in October and sent back to Jordan, has described his advanced training on explosives to Jordanian investigators, according to Western officials. He has told investigators that a key lieutenant of Mr. bin Laden helped arrange his trip to Afghanistan.

A rare reference to the explosives training at the Abu Khabab camp appears in the sealed indictment of Nabil abu Aukel, a Palestinian arrested last June by Israel.

Israel has accused Mr. Aukel of collaborating with Hamas, or the Party of God, the militant Palestinian organization, and several Arab-Israelis on plots aimed at military and civilian targets inside Israel. The indictment, a copy of which was provided by Steven Emerson, an American expert on Islamic terrorism, states that Mr. Aukel, a Palestinian, received advanced training in explosives using chemicals at the Abu Khabab camp in March 1998.

The camp leader warned Mr. Aukel "never to discuss the nature of the training," the indictment says. Israeli officials said Mr. Aukel's arrest marked first time Israel had uncovered an Al Qaeda cell inside its borders.

At the urging of the United States and Russia, which also sees a threat from Afghan training camps, the United Nations recently imposed the harshest economic sanctions on Afghanistan to press the Taliban not only to evict Mr. bin Laden and his senior entourage, but also to close down all the militant camps to foreigners.

The Taliban, or "students of Islam," who rule all but a sliver of Afghanistan, deny that they harbor terrorists or those who train them. Wakil Ahmad Mutawakil, the Taliban foreign minister, said the pressure to expel Mr. bin Laden was both "insulting and useless." Mr. Mutawakil denied in an interview in November that Mr. bin Laden was financing the Taliban, saying he had become a "very poor man." Mr. bin Laden, the foreign minister said, could not possibly be planning terrorist operations since his activities were "closely supervised by Afghan guards."

Mr. Mutawakil recently invited a New York Times reporter to visit any location in Afghanistan identified by Western officials as part of Mr. bin Laden's network.

But Taliban officials in Afghanistan ultimately barred the reporter from visiting any of the locations. At Darunta, the reporter was stopped several miles from the gates of the complex. After five days in Kabul, Jalalabad and environs, the

reporter and her Afghan-American interpreter were politely escorted to the border and told to leave Afghanistan.

The Inspiration
Afghanistan's Appeal As a War Zone

The Afghan cause has inspired several generations of young men determined to wage holy war. Thousands came here in the 1980's to fight the Soviet forces in response to a fatwa, or religious order, from leading Islamic scholars. Thousands more have come since then to help the Taliban expand their power, or to be trained for jihads elsewhere.

Taliban officials boast that they have imposed true Islamic rule, cleansing Afghan society of Western influence. Since their capture of Kabul in 1996, they have among other things banned education for girls and most work for women, and instituted harsh punishments for blasphemy, playing cards, watching television, listening to music and trimming one's beard.

Mr. bin Laden arrived in Afghanistan in 1996 after he was expelled from Sudan. American officials and Afghan opponents of the Taliban say their loyalty to him has been well earned. The officials say Mr. bin Laden provided the Taliban with some of the cash they used to buy off local warlords in their march to power.

His financial support of the Taliban is said to continue. Several diplomats and aid workers in Afghanistan estimated that he had put up millions of dollars—one diplomat's estimate was $40 million—to rebuild roads destroyed in the war against the Soviets and the ensuing civil war.

Mr. bin Laden is also said to be providing the Taliban with military help.

Ahmed Shah Massoud, commander of a group of rebels in northern Afghanistan, said in an interview at his headquarters that he was fighting a unit of soldiers specially trained by Mr. bin Laden, the 55th Brigade, which includes some 700 Arabs

and other militant Muslims. Mr. Massoud said he had captured brigade members, whom he called the most seasoned fighters.

Despite financial aid and weapons from Iran and Russia, Mr. Massoud's alliance lost ground to the Taliban last year. His forces are now confined largely to the northern region's impregnable Panjshir Valley with its soaring, snow-tipped mountains and dazzling vistas.

Mr. Massoud said his soldiers were holding some 1,200 Taliban prisoners, 122 of them foreign Muslims. There are Pakistanis, an immigrant to Pakistan from the Burmese province of Arakan, Yemenis, Britons and Chinese Uigurs, among others. Interviews with several of them illustrate the attraction that Afghanistan still has for militants around the world.

Mr. Mihraban, the young Pakistani, comes from the town of Chaghi, in the province of Baluchistan. His gentle eyes and polite manner gave no hint of the fervor that had led him to this stark prison in the harsh, craggy mountains of the Hindu Kush.

His trip to Afghanistan began when he joined Harakat ul Mujahedeen, a group whose dedication to unlocking India's grip on Kashmir has landed it on the State Department's list of terror groups. He trained first in 1992 at the Salman i Farsi camp in Baktiah, Afghanistan, which was run by Harakat. He said he also fought in Tajikistan.

Obeida Rahman, 21, a Yemeni from Sana from a poor family of 10 children, had his living and training expenses in Afghanistan paid for by the teachers at his madrassa, or religious academy. They had urged him to fight in Afghanistan against his family's wishes, he said. He had relished his training. "When you have a gun, you're free," he said. "You feel as if you can do anything."

Abdul Jalil, 21, from Kashgar in Xingiang Province, China, said that despite his capture, he was glad that he had come and fought in Afghanistan on the $1,000 his father, a farmer, gave him to study. "I still want to create an Islamic state all over the

world, God willing," he said. When he is released, he said, "I will go fight a jihad in China."

The goal of returning home to continue the jihad is common among the prisoners. Julie Sirrs, a former Defense Intelligence Agency analyst who has interviewed many of the non-Afghan prisoners held by Mr. Massoud, said nearly half belonged to groups that the State Department has designated as terrorist. None had ever met Mr. bin Laden, they said, but he was their hero. Ms. Sirrs, now an independent consultant, financed her own studies of the prisoners.

In an interview at one of his camps in the Panjshir Valley in late summer, Mr. Massoud said his prisoners had been deluded into believing that they were fighting a jihad in Afghanistan by helping the Taliban.

The prisoners, he said, are in fact "sinners" for conducting terrorism and violating Islam's injunction against fomenting division within Muslim ranks. "My message to those fighting in Afghanistan now is that they will never get God's blessing for what they are doing in my country," he declared.

The Enablers
How Islamic Schools Urge Students On

American officials acknowledge that they have limited influence over the Taliban, who they say have a powerful regional ally in Pakistan.

Relief officials and Afghans said they saw soldiers in Pakistan Army uniforms fighting for the Taliban last summer and fall. The witnesses reported that Pakistani Army buses with blackened windows and burlap-covered trucks filled with weapons and supplies routinely crossed into Afghanistan heading for the front near Taliqan, a northern town that the government captured last fall.

Mr. Massoud and relief officials in Afghanistan said the Taliban were finding it ever harder to recruit fighters for the civil war

and had even encountered armed resistance to their recruitment missions in different towns and villages. The Taliban forces, he asserted, are increasingly dependent on Pakistani soldiers and students sent to the front to fight for the Islamic cause.

Pakistan denies that it has sent soldiers to fight alongside the Taliban. But diplomats, relief workers and Afghans interviewed in Kabul and Jalalabad insist that Pakistan has provided not only weapons, logistical and other assistance, but soldiers as well.

"Some soldiers apparently came to fight; others for just a look-see at real fighting," said a United Nations official who visited areas near the front during the offensive. "The Taliban were doing quite badly at first. But there is no doubt that Pakistani support gradually turned the tide."

There are also suggestions that Pakistani authorities have pressed students to fight for the Taliban. One relief worker who visited the Indira Gandhi Children's Hospital in Kabul in late June said that all of its 400 beds were filled by Pakistanis wounded at the front, some as young as 15. Several patients said that they had been sent to fight by their religious academies, many of which closed for the summer battle season, leaving impoverished students with no place else to go. A doctor at the hospital said Chechens, Yemenis and Saudis were among the patients.

American officials say they have little leverage over Pakistan. The United States cut off military aid in 1990 after the Pakistanis detonated a nuclear bomb.

With no ally in the region to help, the Clinton administration has mounted a wide-ranging diplomatic campaign to isolate the Taliban militia from the world community. The effort bore fruit late last year when the United Nations, prodded by the United States and Russia, expanded economic sanctions on Afghanistan—a change that will take effect on Jan. 19.

Senior American officials said that for all their concern about the threat of terrorism, the administration never explicitly

offered the Taliban what they most want: formal diplomatic recognition. In its dealing with the Taliban, officials said, the administration promised only that relations would dramatically improve if they expelled Mr. bin Laden and Al Qaeda's leaders and barred foreigners from the camps.

Officials said they decided against directly offering recognition, because, they said, the administration had profound reservations about the Taliban's abuses of human rights, particularly of women.

Senior officials also felt that they could not trust the Taliban to deliver on their promises, citing what they called repeated "lies" from the Afghan leadership about Mr. bin Laden's status.

In late December, President Clinton's top national security advisers gathered in Washington to consider the next steps against the Taliban, including possible military action.

A senior C.I.A. official told the group that the bombing of the destroyer Cole in Yemen in October 2000 appeared to have been organized by Muhammad Omar al-Harazi, a longtime member of Al Qaeda also involved in an earlier attempt to destroy an American warship, The Sullivans, as it passed through Aden in January 2000. Mr. Harazi founded the first Al Qaeda cell in Saudi Arabia and was arrested in 1997, accused of trying to smuggle antitank missiles into the kingdom. Between the failed attack on The Sullivans and the bombing of the Cole, officials said, Mr. Harazi fled to an Al Qaeda guest house in Kandahar, a Taliban stronghold. The C.I.A. said this evidence did not conclusively establish that the group ordered the attack.

Several officials at the meeting opposed military action on the ground that it would achieve little and would make Americans targets of further terrorist attacks. And officials said a military strike could even be counterproductive, enhancing Mr. bin Laden's public standing among militants. "Making him a hero is the last thing we want to do," said one senior American official.

Holy Warriors

SUNDAY—The making of an Islamic terror network.

MONDAY—A look inside a plot that could have crippled Jordan's capital.

TODAY—What motivates the jihad's young recruits.

CAPTIONS: Photos: Muhammad Khaled Mihraban, a Pakistani captured in the Muslim war for control of Afghanistan, says he has killed 100 people. (Alan Chin for The New York Times)(pg. 1 A1); CONDUIT TOWN—Bustling Torkham, on the Afghan border, is reported to be a crossing point for Pakistani fighters and supplies in the Muslim war for control of Afghanistan. (Judith Miller/The New York Times); TALIBAN FOE—Ahmed Shah Massoud, who commands Afghan rebels, criticized foreign holy warriors for dividing Muslims. (Alan Chin for The New York Times); (Satellite image by Space Imaging)(pg. A8)

Chart: "The Darunta Camp Complex"
A cluster of camps in eastern Afghanistan here militants are taught terrorism.

ABU KABHAB CAMP—Osama bin Laden's camp specializing in training in chemicals, poisons and high explosives.

ASSADALAH ABDUL RAHMAN'S CAMP—Camp of the son of Sheik Omar Abdul Rahman, who was convicted in the World Trade Center bombing.

TALIBAN AREA—Housing for Taliban guests.

HIZBI ISLAMI CAMP—Camp of a Pakistani militant group waging war in Kashmir.

JALALABAD AREA—The capital of Nangarhar Province.

(Sources: Middle Eastern and Western intelligence)(pg. A8)

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EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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71 Civ. 2622

UNITED STATES OF AMERICA,

Plaintiff,

—v.—

NEW YORK TIMES COMPANY, ET AL.,

Defendants.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

MAX FRANKEL, being duly sworn, deposes and says:

1. I am the Washington Bureau Chief and the Washington correspondent of The New York Times. I have been a reporter on The Times for 20 years, including 5 years as a foreign correspondent, mostly in Moscow, and 10 years in Washington. In our capital, I have been successively The Times' diplomatic correspondent, White House correspondent and, currently, chief correspondent, supervising the work of 35 editors and reporters, including most of those who prepared the disputed series of articles.

2. I submit this affidavit in opposition to the pending motion by the United States for an injunction barring The

Times, among other things, from, printing further documents relating to its current series of articles on the Vietnam war.

"Secrecy" in Washington

3. The Government's unprecedented challenge to The Times in the case of the Pentagon papers, I am convinced, cannot be understood, or decided, without an appreciation of the manner in which a small and specialized corps of reporters and a few hundred American officials regularly make use of so-called classified, secret, and top secret information and documentation. It is a cooperative, competitive, antagonistic and arcane relationship. I have learned, over the years, that it mystifies even experienced professionals in many fields, including those with Government experience, and including the most astute politicians and attorneys.

4. Without the use of "secrets" that I shall attempt to explain in this affidavit, there could be no adequate diplomatic, military and political reporting of the kind our people take for granted, either abroad or in Washington and there could be no mature system of communication between the Government and the people. That is one reason why the sudden complaint by one party to these regular dealings strikes us as monstrous and hypocritical—unless it is essentially perfunctory, for the purpose of retaining some discipline over the Federal bureaucracy.

5. I know how strange all this must sound. We have been taught, particularly in the past generation of spy scares and Cold War, to think of secrets as *secrets*—varying in their "sensitivity" but uniformly essential to the private conduct of diplomatic and military affairs and somehow detrimental to the national interest if prematurely disclosed. By the standards of official Washington—Government and press alike—this is an antiquated, quaint and romantic view. For practically everything that our Government does, plans, thinks, hears and contemplates in the realms of foreign policy is stamped and treated as secret—and then unraveled by that same Government, by the Congress and

by the press in one continuing round of professional and social contacts and cooperative and competitive exchanges of information.

6. The governmental, political and personal interests of the participants are inseparable in this process. Presidents make "secret" decisions only to reveal them for the purposes of frightening an adversary nation, wooing a friendly electorate, protecting their reputations. The military services conduct "secret" research in weaponry only to reveal it for the purpose of enhancing their budgets, appearing superior or inferior to a foreign army, gaining the vote of a congressman or the favor of a contractor. The Navy uses secret information to run down the weaponry of the Air Force. The Army passes on secret information to prove its superiority to the Marine Corps. High officials of the Government reveal secrets in the search for support of their policies, or to help sabotage the plans and policies of rival departments. Middle-rank officials of government reveal secrets so as to attract the attention of their superiors or to lobby against the orders of those superiors. Though not the only vehicle for this traffic in secrets—the Congress is always eager to provide a forum—the press is probably the most important.

7. In the field of foreign affairs, only rarely does our Government give full public information to the press for the direct purpose of simply informing the people. For the most part, the press obtains significant information bearing on foreign policy only because it has managed to make itself a party to confidential materials, and of value in transmitting these materials from government to other branches and offices of government as well as to the public at large. This is why the press has been wisely and correctly called The Fourth Branch of Government.

8. I remember during my first month in Washington, in 1961, how President Kennedy tried to demonstrate his "toughness" toward the Communists after they built the Berlin wall by having relayed to me some direct-quotations of his best arguments to Foreign Minister Gromyko. We were permitted to

quote from this conversation and did so. Nevertheless, the record of the conversation was then, and remains today, a "secret."

9. I remember a year later, at the height of the Cuban missile crises, a State Department official concluding that it would surely be in the country's interest to demonstrate the perfidy of the same Mr. Gromyko as he denied any knowledge of those missiles in another talk with the President; the official returned within the hour and let me take verbatim notes of the Kennedy-Gromyko transcript—providing only that I would not use direct quotations. We printed the conversation between the President and the Foreign Minister in the third-person, even though the record probably remains a "secret."

10. I remember President Johnson standing beside me, waist-deep in his Texas swimming pool, recounting for more than an hour his conversation the day before, in 1967, with Prime Minister Kosygin of the Soviet Union at Glassboro, N.J., for my "background" information, and subsequent though not immediate use in print, with a few special off-the record sidelights that remain confidential.

11. I remember Secretary of State Dean Rusk telling me at my first private meeting with him in 1961 that Laos is not worth the life of a single Kansas farm boy and that the SEATO treaty, which he should later invoke so elaborately in defense of the intervention in Vietnam, was a useless instrument that should be retained only because it would cause too much diplomatic difficulty to abolish it.

12. Similar dealings with high officials continue to this day.

13. We have printed stories of high officials of this Administration berating their colleagues and challenging even the President's judgment about Soviet activities in Cuba last year.

14. We have printed official explanations of why American intelligence gathering was delayed while the Russians moved missiles toward the Suez Canal last year.

15. These random recollections are offered here not as a systematic collection of secrets made known to me for many, usually self-evident (and often self-serving) reasons. Respect for sources and for many of the secrets prevents a truly detailed accounting, even for this urgent purpose. But I hope I have begun to convey the very loose and special tray in which "classified" information and documentation is regularly employed by our government. Its purpose is not to amuse or flatter a reporter whom many may have come to trust, but variously to impress him with their stewardship of the country, to solicit specific publicity, to push out diplomatically useful information without official responsibility, and, occasionally, even to explain and illustrate a policy that can be publicly described in only the vaguest terms.

16. This is the coin of our business and of the officials with whom we regularly deal. In almost every case, it is secret information and much of the time, it is top secret. But the good reporter in Washington, in Saigon, or at the United Nations, gains access to such information and such sources because they wish to use him for *loyal* purposes of government while he wishes to use *them* to learn what he can in the service of his readers. Learning always to trust each other to some extent, and never to trust each other fully—for their purposes are often contradictory or downright antagonistic—the reporter and the official trespass regularly, customarily, easily and unselfconsciously (even unconsciously) through what they both know to be official "secrets." The reporter knows always to protect his sources and is expected to protect military secrets about troop movements and the like. He also learns to cross-check his information and to nurse it until an insight or story has turned ripe. The official knows, if he wishes to preserve this valuable channel and outlet, to protect his credibility and the deeper purpose that he is trying to serve.

The Role of "Classified" Information

17. I turn now in an attempt to explain, from a reporter's point of view, the several ways in which "classified" information figures in our relations with government. The Government's complaint against The Times in the present case comes with ill-grace because Government itself has regularly and consistently, over the decades, violated the conditions it suddenly seeks to impose upon us—in three distinct ways:

First, it is our regular partner in the informal but customary traffic in secret information, without even the pretense of legal or formal "declassification." Presumably, many of the "secrets" I cited above, and all the "secret" documents and pieces of information that form the basis of the many newspaper stories that are attached hereto, remain "secret" in their official designation.

Second, the Government and its officials regularly and customarily engage in a kind of ad hoc, de facto "declassification" that normally has no bearing whatever on considerations of the national interest. To promote a political, personal, bureaucratic or even commercial interest, incumbent officials and officials who return to civilian life are constantly revealing the secrets entrusted to them. They use them to barter with the Congress or the press, to curry favor with foreign governments and officials from whom they seek information in return. They use then freely, and with a startling record of impunity, in their memoirs and other writings.

Third, the Government and its officials regularly and routinely misuse and abuse the "classification" of information, either by imposing secrecy where none is justified or by retaining it long after the justification has become invalid, for simple reasons of political or bureaucratic convenience. To hide mistakes of judgment, to protect reputations of individuals, to cover up the loss and waste of funds, almost everything in government is kept secret for a time and, in the foreign policy field, classified as "secret" and "sensitive" beyond any rule of law or reason. Every minor official can testify to this fact.

18. Obviously, there is need for some secrecy in foreign and military affairs. Considerations of security and tactical flexibility require it, though usually for only brief periods of time. The Government seeks with secrets not only to protect against enemies but also to serve the friendship of allies. Virtually every mature reporter respects that necessity and protects secrets and confidences that plainly serve it.

19. But for the vast majority of "secrets," there has developed between the Government and the press (and Congress) a rather simple *rule of thumb*: The Government hides what it can, pleading necessity as long as it can, and the press pries out that it can, pleading a need and right to know. Each side in this "game" regularly "wins" and "loses" a round or two. Each fights with the weapons at its command. When the Government loses a secret or two, it simply adjusts to a new reality. When the press loses a quest or two, it simply reports (or misreports) as best it can. Or so it has been, until this moment.

Some Examples

20. Some of the most powerful examples of the widespread traffic in secret information that I describe were found by a few colleagues in the Washington bureau in a most perfunctory search of our files. Even as I write this affidavit I can glance at the Times of June 16, 1971 and find, beside the headline of the Court's temporary restraining order in this case, a sample from our military correspondent, William Beecher:

> WASHINGTON —June 15—The Nixon Administration is engaged in a broad policy review aimed at determining courses of action that might improve South Vietnam's ability to withstand military assaults next year, after most American forces have been withdrawn. . .
>
> Other key developments include an estimate by the National Security Council that North Vietnam is building toward a new offensive in the South next year. . . .

> Well-placed Administration sources disclose that, against the expected North Vietnamese threat, officials are focusing on the following major questions. . . .
>
> Many planners expect President Nixon to scale down to a residual force of 30,000 to 70,000 men by July 1, 1972, but to leave enough flexibility in the pace of reductions so that many of them can be timed for May and June. . .
>
> Should this residual force include many helicopter and artillery units to "stiffen" South Vietnamese defenses. . . .

Not a single source of that information is identified by name, either because sources are peddling information for which they have asked not to be held responsible or because they are revealing information without authorization. Either way, they are relaying secret data which we, judging by other confidential contacts, deem reasonably reliable.

21. Some of the best examples of the regular traffic I describe may be found in the Pentagon papers that the Government asks us not to publish. The uses of top secret information by our Government in deliberate leaks to the press for the purposes of influencing public opinion are recorded, cited and commented upon in several places of the study. Also cited and analyzed are numerous examples of how the Government tried to control the release of such secret information so as to have it appear at a desired time, or in a desired publication, or in a deliberately loud or soft manner for maximum or minimum impact, as desired.

22. The temporary restraining order currently in effect precludes me from citing and quoting these passages in the Pentagon study. Examples of my point are so numerous that despite the great bulk of the papers, we were able to locate more than a dozen different kinds of such passages in less than an hour.

23. Extensive samples of stories plainly based on supposedly secret information are annexed to this affidavit. They include not only regular, daily articles but also major *contem-*

porary analyses of Government decision-making at several key stages of the Vietnam war, right after the Cuban missile crisis, and shortly after the invasion of Cambodia. They include major journalistic investigations of secret institutions, like the Central Intelligence Agency. They combine known facts, pried-out secrets and deliberate disclosures of secrets. They are recognized within the profession and among readers as the most valuable kind of journalism and have never been shown to cause "irreparable" harm to the national security. They have occasionally prompted investigations inside the Government to determine the sources of information, the possible presence of disloyal or dissenting officials or the existence of information not previously given any weight or credibility by higher authority. None of these articles could be fairly described as less "sensitive" or more innocuous than the materials now challenged. None of them ever produced a legal challenge or a request for new legislation,

24. Samples of the second kind of traffic in secrets that I mentioned—the *ad hoc, de facto* (but by no means authorized official or "legal") declassification of documents—are simply too numerous and too voluminous to collect in this format and on such short notice.

25. George Christian of Austin, Tex., former press secretary to President Johnson, who had free admission to all foreign and domestic discussions involving the President, at any level and in any forum, has already published his memoir. It includes 70 pages of narrative on the decisions to end the bombing of North Vietnam in late 1968, with many direct quotations of the President and other officials, many unflattering references to our allies in South Vietnam and a great deal of detailed information, all still highly classified, about the secret negotiations with North Vietnam in Paris. This book, entitled, "The President Steps Down," (MacMillan, 1970), actually covers a period more recent than that discussed in the Pentagon papers, and at a much higher level of government and secrecy.

26. Recently, a book of top secret documents from members of the Joint Chiefs of Staff about the very same period covered by The Times' materials was published. The book, entitled "Roots of Involvement," by Marvin Kalb and Elie Abel (pp. 208-212) includes telegram exchanges between General Westmoreland and General Wheeler in early 1968. We are advised that these texts were taken from privately circulated analyses and histories of phases of the war by leading military commanders, still on active duty!

27. Theodore C. Sorensen's "Kennedy," written within a year of the death of his President, reveals dozens upon dozens of actions, meetings, reports and documents, all still treated as "classified" by the Government and unavailable for more objective journalistic analysis. Sorensen treated the Kennedy-Khrushchev correspondence as private, to protect future channels of communication with Soviet leaders, but the most "secret" of these letters, during the Cuban missile crisis, were fully revealed in two subsequent books, one by Elie Abel and one by Robert F. Kennedy. Sorensen also observes that while Kennedy was still alive he invited Professor Richard Neustadt into Government archives for a contemporary analysis of decision-making of the "Skybolt" affair, the secrets of which were later revealed by the professor in a public account of this minor-missile crisis with Britain.

28. Arthur Schlesinger, Jr., kept notes in the White House for his history of the Kennedy years entitled "A Thousand Days." Roger Hilsman, an intelligence officer and then Assistant Secretary of State for the Far East poured his files and secrets into a quick memoir entitled "To Move a Nation" (Doubleday 1967). John Martin, special ambassador during the Dominican Republic invasion of 1965, wrote "Overtaken by Events," (Doubleday, 1966) recounting numerous confidential messages and communications. Chester Cooper, a C.I.A. official involved in Vietnam policy for two decades left the White House to produce what was probably the most complete and

best-documented history until the Pentagon papers became available to The Times. "The Secret Search for Peace in Vietnam," by David Kraslow and Stuart Loory of The Los Angeles Times, remains to this day the most thorough newspaper (and book) account of the diplomacy surrounding the war-through channels that are still deemed "live".

The Pentagon Study

29. As The Times indicated in the first of its articles about the Pentagon study that is in question here, it is a massive history of how the United States went to war in Indochina. Its 3,000-page analysis, to which 4,000 pages of official documents are appended, was commissioned by Secretary of Defense Robert S. McNamara in 1967 and completed in 1968, by which time he had been replaced by Clark M. Clifford. The analysis covers a historical record, as The Times said, from World War II to May, 1968—the start of the peace talks in Paris, by which time President Johnson had set a limit on further military commitments and revealed his intention to retire. We said that "though far from a complete history, even at 2.5 million words, the study forms a great archive of government decision-making on Indochina over three decades." That was the most concise journalistic definition we could give to the materials. Examination of our report thus far on the study and presentation of its documentation confirms the accuracy of that definition.

30. Moreover, the material was treated by The Times as an historical record that was of importance not only to our daily readers but also to the community of scholars that we have long served with a record of events. Our presentation was subjected to the most careful editing so that our report would remain faithful to the Pentagon record itself.

31. It is difficult, while publication is suspended, to describe the content and scope of the material. But our first article has already established the framework for our readers. We said the

authors of the study reached many broad conclusions and specific findings, including the following:

(a) "—That the Truman Administration's decision to give military aid to France in her colonial war against the Communist led Vietminh 'directly involved' the United States in Vietnam and 'set' the course of American policy.

(b) "—That the Eisenhower Administration's decision to rescue a fledgling South Vietnam from a Communist takeover and attempt to undermine the new Communist regime of North Vietnam gave the Administration a 'direct role in the ultimate breakdown of the Geneva settlement' for Indochina in 1954.

(c) "—That the Kennedy Administration, though ultimately spared from major escalation decisions by the death of its leader, transformed a policy of 'limited-risk gamble,' which it inherited, into a 'broad commitment' that left President Johnson with a choice between more war and withdrawal.

(d) "—That the Johnson Administration, though the President was reluctant and hesitant to take the final decision, intensified the covert warfare against North Vietnam and began planning in the spring of 1964 to wage overt war, a full year before it publicly revealed the depth of its involvement and its fear of defeat.

(e) "—That this campaign of growing clandestine military pressure through 1964 and the expanding program of bombing North Vietnam in 1965 were begun despite the judgment of the Government's intelligence community that the measures would not cause Hanoi to cease its support of the Vietcong insurgency in the South, and that the bombing was deemed militarily ineffective within a few months.

(f) "—That these four succeeding Administrations built up the American political, military and psychological stakes in Indochina, often more deeply than they realized

at the time, with large-scale military equipment to the French in 1950; with acts of sabotage and terror warfare against North Vietnam beginning in 1954; with moves that encouraged and abetted the overthrow of President Ngo Dinh Diem of South Vietnam in 1953; with plans, pledges and threats of further action that sprang to life in the Tonkin Gulf clashes in August, 19004; with the careful preparation of public opinion for the years of open warfare that were to follow; and with the calculation in 1965, as the planes and troops were openly committed to sustain combat, that neither accommodation inside South Vietnam nor early negotiations with North Vietnam would achieve the desired result."

(g) Further characterizing the materials, our introduction also indicated revelations "about the ways in which several administrations conducted their business on a fateful course, with much new information about the roles of dozens of senior officials of both major political parties and a whole generation of military commanders."

32. The Times found the history to be concerned primarily with the decision-making process in Washington and the thoughts, motives, plans, debates and calculations of the decisionmakers. I have seen no materials bearing on future plans of a diplomatic or military nature. The Times' interest throughout, like that of the study itself, in the words of our opening line, was in "*how the United States went to war in Indochina*."

33. In considering the remainder of the material, in preparation for publication, it is difficult to be precise, without compromising our deep conviction that no agency of Government ought to be placed in the position of approving, or being asked to approve, prior to publication, any article or other materials that we plan to publish in the exercise of our profession.

34. But it may be helpful to affirm to the Court what is already plain from what we have published so far. The remain-

ing articles will be of the same historical character as the first three, similarly dealing with the decision-making process and the thoughts, debates and calculations of the decision-makers.

35. Of the numbered paragraphs in our original introduction to the first article, the materials and accounts bearing on paragraphs (4) and (5) and a part of (6)—covering the period from early 1964 to the middle of 1965—have already appeared in print. The remainder of that introduction was deemed by us to be a fair journalistic summary of the remainder of our story.

36. Within the limits we have set on discussion of our unpublished articles, we can state that the stories will cover, as we have indicated, the origins of the United States involvement in Southeast Asia from World War II forward, in the broad context of our evolving policy for the Pacific, through the period of the Eisenhower Administration and the Geneva conference on Indochina. They will cover the history of policymaking inherited by President Kennedy and the Kennedy years, including the broad perspective of those years, which involved the specific problem of political stability culminating in the overthrow of President Ngo Dinh Diem. Among other things, our stories will also cover the history of other policy decisions through early 1968, including the personal disillusionment with policy felt by Secretary McNamara and the roles of other policymakers.

37. The Pentagon papers published and to be published by the Times and a bureaucratic history and analysis of the interaction of events and policy decisions are an invaluable historical record of a momentous era in our history. We cannot believe they should or ~~will~~ be suppressed.

/s/ Max Frankel
Max Frankel

Sworn to before me this
17th day of June, 1971

/s/ Notary Public

[Exhibits omitted.]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TO BE FILED UNDER SEAL*

Case No. Misc. ____ (TFH)

In re SPECIAL COUNSEL INVESTIGATION,
In re GRAND JURY SUBPOENAS TO JUDITH MILLER

AFFIDAVIT OF FLOYD ABRAMS

DISTRICT OF COLUMBIA: ss.:

FLOYD ABRAMS, being first duly sworn, deposes and says:

1. I am a member of the bar of the State of New York, the United States Court of Appeals for the District of Columbia and a partner in the firm of Cahill Gordon & Reindel LLP, attorneys for *New York Times* journalist, Judith Miller. My client has been subpoenaed by the Office of Special Counsel to testify in this grand jury investigation. I understand that the Special Counsel's investigation seeks to learn the identity of the source or sources who leaked Valerie Plame's identity and her association with the CIA.

2. I am fully familiar with the facts and circumstances set forth herein and make this affidavit based on my personal knowledge unless otherwise stated.

3. The Special Counsel has separately been advised by the New York Times, Company ("The Times"), also the recipient of

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* This affidavit was unsealed by order of the district court.

a document subpoena, that it does not possess any documents responsive to the subpoena directed at it. I make this affidavit in support of Ms. Miller's motion to quash the subpoenas issued to her, or in the alternative, for a protective order regarding those subpoenas.

4. On August 10, 2004, Deputy Special Counsel Jim Fleissner, advised me in a confidential conversation that unless Ms. Miller voluntarily agreed to be interviewed, his office intended to cause a grand jury subpoena to be issued to Ms. Miller requiring her testimony. Mr. Fleissner also indicated during our conversation that additional grand jury subpoenas seeking documents from Ms. Miller and from The Times would be forthcoming. Mr. Fleissner indicated that the Special Counsel would seek testimony from Ms. Miller about communications she may have had with a specifically identified individual and would seek documents from Ms. Miller and The Times related to those possible communications and any documents that may have been provided to Ms. Miller by that individual on July 8, 2003.

5. I have been informed by the Special Counsel's office that the individual in question has already spoken with the FBI and that he had signed a waiver of the confidentiality of his communications with reporters, stating in substance that he wanted any journalists he may have spoken to about this matter to cooperate with the government's investigation and not to claim journalistic privilege when questioned by governmental authorities.

6. Attached hereto as Exhibit A is a true and correct copy an op-ed piece by former Ambassador Joseph C. Wilson, published in *The New York Times* on July 6, 2003, titled *What I Didn't Find in Africa*.

7. Attached hereto as Exhibit B is a true and correct copy a column written by Robert Novak on July 14, 2003, titled, *The Mission to Niger*.

8. Attached as Exhibit C is a true and correct copy of a transcript of a Department of Justice Press Conference, held on December 30, 2003.

9. Attached hereto as Exhibits D, E and F, respectively, are affidavits of three journalists—Scott Armstrong, Jack Nelson, and Anna Nelson—supporting this motion to quash and/or for a protective order.

/s/ Floyd Abrams
Floyd Abrams

Sworn to before me this
19th day of August, 2004

/s/ Notary Public
Notary Public

EXHIBIT A

July 6, 2003, Sunday

Op-Ed Page

What I Didn't Find in Africa

By Joseph C. Wilson IV

WASHINGTON—Did the Bush administration manipulate intelligence about Saddam Hussein's weapons programs to justify an invasion of Iraq?

Based on my experience with the administration in the months leading up to the war, I have little choice but to conclude that some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat.

For 23 years, from 1976 to 1998, 1 was a career foreign service officer and ambassador. In 1990, as charge d'affaires in Baghdad, I was the last American diplomat to meet with Saddam Hussein. (I was also a forceful advocate for his removal from Kuwait.) After Iraq, I was President George H. W. Bush's ambassador to Gabon and Sao Tome and Principe; under President Bill Clinton, I helped direct Africa policy for the National Security Council.

It was my experience in Africa that led me to play a small role in the effort to verify information about Africa's suspected link to Iraq's nonconventional weapons programs. Those news stories about that unnamed former envoy who went to Niger? That's me.

In February 2002, I was informed by officials at the Central Intelligence Agency that Vice President Dick Cheney's office had questions about a particular intelligence report. While I never saw the report, I was told that it referred to a memorandum of agreement that documented the sale of uranium yellowcake—a form of lightly processed ore—by Niger to Iraq in the late 1990's. The agency officials asked if I would travel to

Niger to check out the story so they could provide a response to the vice president's office.

After consulting with the State Department's African Affairs Bureau (and through it with Barbro Owens-Kirkpatrick, the United States ambassador to Niger), I agreed to make the trip. The mission I undertook was discreet but by no means secret. While the C.I.A. paid my expenses (my time was offered pro bono), I made it abundantly clear to everyone I met that I was acting on behalf of the United States government.

In late February 2002, I arrived in Niger's capital, Niamey, where I had been a diplomat in the mid-70's and visited as a National Security Council official in the late 90's. The city was much as I remembered it. Seasonal winds had clogged the air with dust and sand. Through the haze, I could see camel caravans crossing the Niger River (over the John F. Kennedy bridge), the setting sun behind them. Most people had wrapped scarves around their faces to protect against the grit, leaving only their eyes visible.

The next morning, I met with Ambassador Owens-Kirkpatrick at the embassy. For reasons that are understandable, the embassy staff has always kept a close eye on Niger's uranium business. I was not surprised, then, when the ambassador told me that she knew about the allegations of uranium sales to Iraq—and that she felt she had already debunked them in her reports to Washington. Nevertheless, she and I agreed that my time would be best spent interviewing people who had been in government when the deal supposedly took place, which was before her arrival.

I spent the next eight days drinking sweet mint tea and meeting with dozens of people: current government officials, former government officials, people associated with the country's uranium business. It did not take long to conclude that it was highly doubtful that any such transaction had ever taken place.

Given the structure of the consortiums that operated the mines, it would be exceedingly difficult for Niger to transfer uranium to Iraq. Niger's uranium business consists of two mines, Somair and Cominak, which are run by French, Spanish, Japanese, German and Nigerian interests. If the government wanted to remove uranium from a mine, it would have to notify the consortium, which in turn is strictly monitored by the International Atomic Energy Agency. Moreover, because the two mines are closely regulated, quasi-governmental entities, selling uranium would require the approval of the minister of mines, the prime minister and probably the president. In short, there's simply too much oversight over too small an industry for a sale to have transpired.

(As for the actual memorandum, I never saw it. But news accounts have pointed out that the documents had glaring errors—they were signed, for example, by officials who were no longer in government—and were probably forged. And then there's the fact that Niger formally denied the charges.)

Before I left Niger, I briefed the ambassador on my findings, which were consistent with her own. I also shared my conclusions with members of her staff. In early March, I arrived in Washington and promptly provided a detailed briefing to the C.I.A. I later shared my conclusions with the State Department African Affairs Bureau. There was nothing secret or earth-shattering in my report, just as there was nothing secret about my trip.

Though I did not file a written report, there should be at least four documents in United States government archives confirming my mission. The documents should include the ambassador's report of my debriefing in Niamey, a separate report written by the embassy staff, a C.I.A. report summing up my trip, and a specific answer from the agency to the office of the vice president (this may have been delivered orally). While I have not seen any of these reports, I have spent enough time in government to know that this is standard operating procedure.

I thought the Niger matter was settled and went back to my life. (I did take part in the Iraq debate, arguing that a strict containment regime backed by the threat of force was preferable to an invasion.) In September 2002, however, Niger re-emerged. The British government published a "white paper" asserting that Saddam Hussein and his unconventional arms posed an immediate danger. As evidence, the report cited Iraq's attempts to purchase uranium from an African country.

Then, in January, President Bush, citing the British dossier, repeated the charges about Iraqi efforts to buy uranium from Africa.

The next day, I reminded a friend at the State Department of my trip and suggested that if the president had been referring to Niger, then his conclusion was not borne out by the facts as I understood them. He replied that perhaps the president was speaking about one of the other three African countries that produce uranium: Gabon, South Africa or Namibia. At the time, I accepted the explanation. I didn't know that in December, a month before the president's address, the State Department had published a fact sheet that mentioned the Niger case.

Those are the facts surrounding my efforts. The vice president's office asked a serious question. I was asked to help formulate the answer. I did so, and I have every confidence that the answer I provided was circulated to the appropriate officials within our government.

The question now is how that answer was or was not used by our political leadership. If my information was deemed inaccurate, I understand (though I would be very interested to know why). If, however, the information was ignored because it did not fit certain preconceptions about Iraq, then a legitimate argument can be made that we went to war under false pretenses. (It's worth remembering that in his March "Meet the Press" appearance, Mr. Cheney said that Saddam Hussein was "trying once again to produce nuclear weapons.") At a minimum, Congress, which authorized the use of military force at the pres-

ident's behest, should want to know if the assertions about Iraq were warranted.

I was convinced before the war that the threat of weapons of mass destruction in the hands of Saddam Hussein required a vigorous and sustained international response to disarm him. Iraq possessed and had used chemical weapons; it had an active biological weapons program and quite possibly a nuclear research program—all of which were in violation of United Nations resolutions. Having encountered Mr. Hussein and his thugs in the run-up to the Persian Gulf war of 1991, I was only too aware of the dangers he posed.

But were these dangers the same ones the administration told us about? We have to find out. America's foreign policy depends on the sanctity of its information. For this reason, questioning the selective use of intelligence to justify the war in Iraq is neither idle sniping nor "revisionist history," as Mr. Bush has suggested. The act of war is the last option of a democracy, taken when there is a grave threat to our national security. More than 200 American soldiers have lost their lives in Iraq already. We have a duty to ensure that their sacrifice came for the right reasons.

EXHIBIT B

CHICAGO SUN-TIMES

Author: Robert Novak **Date:** July 14, 2003
Page: 31 **Section:** EDITORIAL

The mission to Niger

The CIA's decision to send retired diplomat Joseph C. Wilson to Africa in February 2002 to investigate possible Iraqi purchases of uranium was made routinely without Director George Tenet's knowledge. Remarkably, this produced a political fire storm that has not yet subsided.

Wilson's report that an Iraqi purchase of uranium yellowcake from Niger was highly unlikely was regarded by the CIA as less than definitive, and it is doubtful Tenet ever saw it. Certainly, President Bush did not, before his 2003 State of the Union address, when he attributed reports of attempted uranium purchases to the British government. That the British relied on forged documents made Wilson's mission, nearly a year earlier, the basis of furious Democratic accusations of burying intelligence though the report was forgotten by the time the president spoke.

Reluctance at the White House to admit a mistake has led Democrats ever closer to saying the president lied the country into war. Even after a belated admission of error last Monday, finger-pointing between Bush administration agencies continued.

Wilson's mission was created after an early 2002 report by the Italian intelligence service about attempted uranium purchases from Niger, derived from forged documents prepared by what the CIA calls a "con man." This misinformation spread through the U.S. government. The White House, State Department and Pentagon asked the CIA to look into it.

That's where Joe Wilson came in. His first public note had come in 1991 after 15 years as a Foreign Service officer when, as U.S. charge in Baghdad, he risked his life to shelter in the embassy 800 Americans from Saddam Hussein's wrath. My partner Rowland Evans reported from the Iraqi capital in our column that Wilson showed "the stuff of heroism." The next year, President George H.W. Bush named him ambassador to Gabon, and President Bill Clinton put him in charge of African affairs at the National Security Council until his retirement in 1998.

Wilson never worked for the CIA, but his wife, Valerie Plame, is an agency operative on weapons of mass destruction. Two senior administration officials told me his wife suggested sending Wilson to Niger to investigate the Italian report. The CIA says its counter-proliferation officials selected Wilson and asked his wife to contact him. "I will not answer any question about my wife," Wilson told me.

After eight days in the Niger capital, Wilson made an oral report in Langley that an Iraqi uranium purchase was "highly unlikely," though he also mentioned in passing that a 1988 Iraqi delegation tried to establish commercial contacts. CIA officials did not regard Wilson's intelligence as definitive, being based primarily on what the Niger officials told him and probably would have claimed under any circumstances. The CIA report based on Wilson's briefing remains classified. All this was forgotten until reporter Walter Pincus revealed in the Washington Post on June 12 that an unnamed retired diplomat had given the CIA a negative report. Not until Wilson went public on July 6, however, did his finding ignite the fire storm.

During the run-up to the invasion of Iraq, Wilson had taken a measured public position-viewing weapons of mass destruction as a danger but considering military action as a last resort. He has seemed much more critical since revealing his role in Niger. In the Washington Post on July 6, he talked about the Bush team "misrepresenting the facts," asking: "What else are they lying about?"

After the White House admitted error, Wilson declined all television and radio interviews.

"The story was never me," he told me, "it was always the statement in [Bush's] speech."

The story, actually, is whether the administration deliberately ignored Wilson's advice, and that requires scrutinizing the CIA summary of what their envoy reported. The agency never before has declassified that kind of information, but the White House would like it to do just that now—in its and in the public's interest.

Chicago Sun Times
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EXHIBIT C

DEPARTMENT OF JUSTICE PRESS CONFERENCE

WASHINGTON, D.C.

APPOINTMENT OF SPECIAL PROSECUTOR TO OVERSEE INVESTIGATION INTO ALLEGED LEAK OF CIA AGENT IDENTITY AND RECUSAL OF ATTORNEY GENERAL ASHCROFT FROM THE INVESTIGATION

DEPUTY ATTORNEY GENERAL JAMES COMEY
ASSISTANT ATTORNEY GENERAL CHRISTOPHER RAY

DECEMBER 30, 2003

MR. COMEY: Good afternoon, folks. I'm joined behind the podium by Assistant Attorney General Christopher Ray. We are here to announce a couple of procedural developments in the investigation into allegations that the identity of a CIA employee was improperly disclosed to the media last July.

The first development is that effective today, the attorney general has recused himself and his office staff from further involvement in this matter. By that act, I automatically become the acting attorney general for purposes of this case with authority to determine how the case is investigated, and if warranted by the evidence, prosecuted.

The attorney general, in an abundance of caution, believed that his recusal was appropriate based on the totality of the circumstances and the facts and evidence developed at this stage of the investigation. I agree with that judgment. And I also agree that he made it at the appropriate time, the appropriate point in this investigation.

The second development is that prior to his recusal, the attorney general and I agreed that it was appropriate to appoint a special counsel [read: special prosecutor] from outside our normal chain of command to oversee this investigation.

By his recusal, of course, the attorney general left to me the decision about how to choose a counsel, who that person should be and what that person's mandate should be. In anticipation of this development, I have given a great deal of thought to this in recent days and have decided that, effective immediately, the United States attorney for the Northern District of Illinois, Patrick J. Fitzgerald, will serve as special counsel in charge of this matter. I chose Mr. Fitzgerald, my friend and former colleague, based on his sterling reputation for integrity and impartiality. He is an absolutely apolitical career prosecutor. He is a man with extensive experience in national security and intelligence matters, extensive experience conducting sensitive investigations, and in particular, experience in conducting investigations of alleged government misconduct.

I have today delegated to Mr. Fitzgerald all the approval authorities that will be necessary to ensure that he has the tools to conduct a completely independent investigation; that is, that he has the power and authority to make whatever prosecutive judgments he believes are appropriate, without having to come back to me or anybody else at the Justice Department for approvals. Mr. Fitzgerald alone will decide how to staff this matter, how to continue the investigation and what prosecutive decisions to make. I expect that he will only consult with me or with Assistant Attorney General Ray, should he need additional resources or support.

You should know that as I thought about this matter in recent days, I considered other alternatives. I first considered having the matter handled by Assistant Attorney General Ray and myself acting as ultimate supervisors and decision-makers.

You will not be surprised to learn that I have great confidence in my own ability to be fair and impartial. I also have complete

confidence in Chris Ray's ability to be fair and impartial. He is—those of you who don't know him, he is a total pro and one of the people who makes this department great.

But as I said, both the attorney general and I thought it prudent—and maybe we are being overly cautious, but we thought it prudent to have the matter handled by someone who is not in regular contact with the agencies and entities affected by this investigation. As part of our counterterrorism responsibilities, Assistant Attorney General Ray and I work every single day with the national security intelligence community here in Washington. Mr. Fitzgerald, in Chicago, does not.

At a time when fighting terrorism is the department's top priority, as it should be, it is imperative that Mr. Ray and I be able to focus on that responsibility without the complication that would come from also having to make decisions about this investigation.

Let me add that my decision to assign this matter to the United States attorney from Chicago is not a reflection on the people who have conducted this investigation to date or the way they have done it. We have a fabulous team of FBI agents working this case, coordinating with some of our very best career lawyers. I now know in great detail the work that they have done very quickly in this investigation, and it is impressive.

I should add that Mr. Fitzgerald may well decide to keep some or all of the career team that has been working this case, but that's entirely his call.

I also considered naming a special counsel from outside the government.

The regulations promulgated in 1999 by Attorney General Reno say that an outside special counsel should—and I'm going to read you the quote—"be a lawyer with a reputation for integrity and impartial decision-making, and with appropriate experience to ensure both that the investigation will be conducted ably, expeditiously and thoroughly and that investigative and pros-

ecutorial decisions will be supported by an informed understanding of the criminal law and Department of Justice policies."

When I read that, I realized that it describes Pat Fitzgerald perfectry. I once told a Chicago newspaper that Pat Fitzgerald was Eliot Ness with a Harvard law degree and a sense of humor. Anyone who knows him, who knows his work, who knows his background, knows that he is the perfect man for this job.

The attorney general and I agree that all leak investigations must be conducted with energy and urgency. That is all the more true when the investigation centers on allegations that there has been a disclosure of national security information. To date this investigation has been conducted professionally and expeditiously, and I believe it would not be in the public interest for anything I do to cause this investigation to be put on hold for any period of time.

My choice of Pat Fitzgerald, a sitting United States attorney, permits this investigation to move forward immediately and to avoid the delay that would come from selecting, clearing and staffing an outside special counsel operation. In addition, in many ways the mandate that I am giving to Mr. Fitzgerald is significantly broader than that that would go to an outside special counsel.

In short, I have concluded that it is not in the public interest to remove this matter entirely from the Department of Justice, but that certain steps are appropriate to ensure that the matter is handled properly and that the public has confidence in the way in which it is handled. I believe the assignment to Mr. Fitzgerald achieves both of those important objectives.

Now I'd be happy to take any questions you might have.

Yes, sir?

Q: What happened? I mean, you guys were defending the professional staff here at the Justice Department to handle it, and

now all the sudden you're appointing Mr. Fitzgerald. What happened to tip it?

MR. COMEY: Well, I think what the Department of Justice has said to date is that all options were open; that it was being handled professionally by the career lawyers and FBI agents on the matter. And that's absolutely true. I know the details of this investigation. I've been down in the weeds and looked at the work they've done, and it's exactly what you were told it was: career prosecutors working very, very hard on it.

It's just that we reached a point in the investigation where the attorney general and I thought it was appropriate to make the judgment that's been made.

Q: Well what's different? Why did you decide now to send it to Fitzgerald if everything was going so well?

MR. COMEY: Well, I can't tell you that, and the reason for that is obvious; I can't tell you about the details of any criminal investigation because our goal is to make sure that anyone we're pursuing doesn't know what we're doing, and also, anyone who might not be charged with a crime is not unfairly smeared.

What happened is that the attorney general and I have periodically looked at these facts that have been developed and made a judgment, based on the totality of the circumstances, as to whether he should remain involved in it, and if he's to be out of it, what I should do with it. And so I just decided that based on what I knew about it, it was appropriate, for the reasons I said, for the attorney general to step aside—a conclusion he reached on his own—and for me to assign it to an independent United States Attorney.

Yes, sir?

Q: Even without names, was there some conflict, particular conflict that arose?

MR. COMEY: Well, the issue surrounding the attorney general's recusal is not one of actual conflict of interest that arises nor-

mally when someone has a financial interest or something. The issue that he was concerned about was one of appearance. And I can't go beyond that. That's the reason he decided, really in an abundance of caution, that he ought to step aside and leave me as acting attorney general for those matters.

Yes, sir?

Q: You mentioned the facts and the evidence that's been developed and how that played a role in this decision. Should this be seen as a sign that the evidence has taken you closer to people that Mr. Ashcroft has a connection with and that could create at least the appearance of a conflict? Has the evidence led you in that direction?

MR. COMEY: I can't answer that, Eric. And I know it's inevitable that you're going to speculate. I really hope you don't do that because as I said, the attorney general made this judgment based on the totality picture, looking at all the circumstances and facts and evidence in the case. If you were to speculate in print or in media about particular people, I think that would be unfair to them. The reason, as you know, that we work so hard—I've done this for a long time—to keep these investigations secret is so that we don't do that to people.

What I can tell you is that the investigation has been moving along very, very quickly; has been worked very, very hard and very, very well, and it reached a point where we simply thought these judgments were appropriate.

Yes, sir?

Q: Jim, but you did say, when you were asked why now, that you can't tell us that, you can't talk about the details of any criminal investigation. Is it at least safe to say that it's the details at this point that tipped the balance? Is that accurate?

MR. COMEY: It's fair to say that an accumulation of facts throughout the course of the investigation over the last several months has led us to this point. What those facts are and where

they tell us we're going is stuff I can't get into and that I would hope you would not speculate about.

Yes, sir?

Q: Without getting in the details of people, can you describe sort of the scope of the investigation in terms of how many agents are working on it? I guess there's another prosecutor that's been added recently. How many agents, how many prosecutors, and how many people have been interviewed?

MR. COMEY: That's the kind of detail—exactly the kind of detail I can't get into. All I can tell you is that based on my inspection of it, it's been worked well, it's been worked appropriately, it's been staffed appropriately. But beyond that, I can't say. Yes, ma'am?

Q: Do you have any sort of timeline about when you think this investigation will be over?

MR. COMEY: I do not. That will be Mr. Fitzgerald's call. He'll be in charge of the matter and he'll make that judgment.

Q: How will this work from a procedural standpoint? Mr. Fitzgerald clearly is in Chicago, over 500 miles away. How will he lead an investigation that (normally ?) takes place here in Washington?

MR. COMEY: Well, there are—I think hourly—flights, maybe very half-hour, to Chicago. And he'll get to know those folks.

Q: (Off mike)—from Chicago? I mean, how will this work?

MR. COMEY: That's his -

Q: How will he juggle it with his duties based in Illinois?

MR. COMEY: Well, that's a call he'll have to make. He understands the priority here. I told him that my mandate to him was very simple: Follow the facts wherever they lead, and do the right thing at all times. And that's something, if you know this guy, is not something I even needed to tell him.

Yes, sir?

Q: Can you clarify the timeline a little bit? You said Ashcroft made the decision to recuse himself and informed you of it. Can you tell us when that decision was made, when he told you? You said you've been thinking for a couple days on how to proceed. Can you tell us about that timeline?

MR. COMEY: Well, this has come together really in the last week. The attorney general entered—I don't know whether it was entered an order, but a document was created this morning that memorialized the recusal. It has to be done kind of officially. Once that was done, I officially became assistant—excuse me, acting attorney general for the purpose of this case, and then was in a position to do what I've described. But because we've been discussing this matter and had sort of reached this conclusion over the last week, I had plenty of time to think about what I wanted to do with it.

Q: Is this a suggestion that you brought to him first?

MR. COMEY: I don't want to talk about my discussions with the attorney general. What I can tell you is that it was always in his mind that it might be necessary at some point for him to step away from this, step aside from this, and that it might be necessary to change the way it was approached, to move it outside the normal chain of command.

I can't—and for that reason—that was the reason—much was made in the press, apparently, that he was learning about the facts of it. He was being briefed periodically on the facts, so that he could make the very judgment he made here. And I can tell you none of that acted to delay this investigation in any way. The attorney general learned enough about the case that at a point where it was appropriate, he made the judgment to step aside.

And I, at the same time, was making my own judgments, and that is agreeing with him that it was appropriate for him to step aside, but also reaching the conclusion that it was appropriate

to change the way we were handling this, for the reasons I talked about in my statement.

And as I said, I have great confidence in the two guys standing on this stage. And—but my judgment was, simply because of the subject matter involved here and our duties -which most people don't realize, but we spend part of every day working on national security intelligence stuff—that it was better for us to be able to focus on that, which is our nation's number-one priority, and not, at the same time, be making judgments about who to interview and all the things that come with an investigation.

Yes, sir?

Q: Pat Fitzgerald works a lot with national security and intelligence issues as well, however, does he not? I mean, he's running one of the largest U.S. attorney's offices in the country. He's overseen some major prosecutions. Where's the line between the contact you two have versus the kind of contact that he—he's also fairly well-known, I think, for his work in national security.

MR. COMEY: He is, but his—not to say what he's doing now is not real important, but his role is very, very different. I mean, every day Chris Ray and I are dealing with the key national security intelligence agencies. Mr. Fitzgerald is not. He may have a case that occasionally brings him into contact with that, but he's running a U.S. attorney's office, working on corruption cases, drug cases, gang cases. It's a very different sort of connection. And so that's why I thought this was appropriate.

Yes, sir?

Q: Will this office be an independent office that's set up someplace outside of Justice and the FBI, where most of the people may be drawn from? (Off mike)—special prosecutor's office.

MR. COMEY: I don't know where it'll be housed. Wherever Mr. Fitzgerald wants to house it, we'll make sure we get him the space that he wants. That's not a matter I've discussed with him.

Q: You mentioned that the attorney general's office—the staff in his office itself are also being recused. Why was that decision made? And who and how many people are included in that recusal?

MR. COMEY: I don't know how many people. The entire—"personal staff" is not what they call it, but the entire staff of the office of the attorney general would be recused.

And that, I believe, is fairly standard fare, because they are—just as my staff, whether they like it or not, is an extension of me, his staff is an extension of him, and they're of a piece.

There was a question -

Q: Attorney General Reno said several years ago—and I think many of us quoted this when all this came up—that many of the investigations—leak investigations are closed without a suspect ever being identified. Can you tell us if a suspect or suspects, in your term of art, has been identified in this case, or do you—are you confident that that is likely to happen in this case?

MR. COMEY: I can't do that. Just—and it's not this particular investigation. I would never say that kind of details on any pending criminal investigation. I just can't do it, for the reasons I said. We don't want people that we might be interested in to know we're interested in them. We also don't want to smear somebody who might be innocent and might not be charged. That's why the secrecy of our process, I think, is what makes our process great.

STAFF: A question here. Sir?

Q: Does the attorney general still have the authority to fire the U.S. attorney?

MR. COMEY: No. I don't think the attorney general ever has the authority to fire a U.S. attorney. It's one of the things I loved about being a U.S. attorney. I believe the president is the only person who has authority to remove a United States attorney.

In this circumstance, because the attorney general is recused, I am the acting attorney general, for purposes of this matter. So to the—

Q: Could you fire Fitzgerald?

MR. COMEY: That's a great question. (Laughter.) Now I believe that I could revoke the delegation of authority that I've given to him. I don't believe that I could—

Q: So how does that move it outside the traditional chain of command, as you put it?

MR. COMEY: Well, because what I've done with Fitzgerald is—the normal outside counsel, appointed outside, or the ordinary U.S. attorney, if he needs to issue a subpoena involving the media, for example, or if he wants to grant immunity to somebody or if he wants to take an appeal, has to come for approval to the Department of Justice. Pat Fitzgerald will not, for these purposes.

He is a—

Q: If you don't like what he's doing, you can end it.

MR. COMEY: Well, in theory, if I know what he's doing, in theory I could, yeah. And I'd better have a darn good reason for doing it, because you'd have your hands in the air.

Yes, sir?

Q: I wanted to ask you an unrelated question about the Code Orange and the terrorism alert. As we go into the New Year's Eve, can you discuss at all what the current status is, whether you think threats are diminishing or staying the same or getting more intense? And also if you can comment at all about the flights from Paris, the Air France flights, and what seems to be a disconnect between the French, saying that there doesn't appear to be that much of a problem, and people here saying that they do believe there was a threat on that flight?

MR. COMEY: Okay. All of those questions really are best addressed to Homeland security. What I can tell you is I think what Secretary Ridge has already said, and that is that we are in a period of heightened concern, and as he said, I think, that extends into January. Folks shouldn't think that if the New Year's Eve passes, that we're out of the woods with regard to the heightened alert. So that remains.

With respect to the Air France flight, that's really not something I could comment on. Yes, sir?

Q: How was the White House informed about this decision?

MR. COMEY: I contacted each of the general counsels of the agencies that had been affected in some way or contacted as part of this investigation. That is, I called Defense, State, CIA and White House Counsel's Office to simply inform them that there was going to be a change in the prosecutor in charge of this matter, I would announce it at 2:00. I did that in the last several hours.

Q: But there was no separate consultation with the White House?

MR. COMEY: No. No. All I did was just inform them, as I did, as I said, State, Defense, CIA: I just want to tell you, here's what I'm announcing at 2:00.

Q: And the attorney general didn't consult with them or inform them personally of his decision?

MR. COMEY: I can't speak to—I don't believe so. I can't speak to that. I don't think there was any consultation of the attorney general with those agencies.

Yes, sir?

Q: You mentioned that the—you felt that Fitzgerald will have a broader—actually a broader mandate, broader abilities than an outside counsel. Can you expand on that a little bit? In what respect will he have a—

MR. COMEY: Yes. An outside counsel has a—the regulations prescribe a number of ways in which they're very similar to a U.S. attorney. For example, they have to follow all Department of Justice policies regarding approvals. So that means if they want to subpoena a member of the media, if they want to grant immunity, if they want to subpoena a lawyer—all the things that we as U.S. attorneys have to get approval for, an outside counsel has to come back to the Department of Justice. An outside counsel also only gets the jurisdiction that is assigned to him and n6 other. The regulations provide that if he or she wants to expand that jurisdiction, they have to come back to the attorney general and get permission.

Fitzgerald has been told, as I said to you: Follow the facts; do the right thing. He can pursue it wherever he wants to pursue it.

An outside counsel, according to the regulations, has to alert the attorney general to any significant event in the case; file what's called an "urgent report." And what that means is just as U.S. attorneys have to do that, he would have to tell the attorney general before he brought charges against anybody, before maybe a significant media event, things like that. Fitzgerald does not have to do that; he does not have to come back to me for anything. I mean, he can if he wants to, but I've told him, our instructions are: You have this authority; I've delegated to you all the approval authority that I as attorney general have. You can exercise it as you see fit.

And a U.S. attorney or a normal outside counsel would have to go through the approval process to get permission to appeal something. Fitzgerald would not because of the broad grant of authority I've given him.

So, in short, I have essentially given him—not essentially—I have given him all the approval authorities that rest—that are inherent in the attorney general; something that does not happen with an outside special counsel.

Q: I assume this is written down somewhere, and are we going to get a copy of it?

MR. COMEY: I don't know whether you'll get a copy, but he will.

Q: Getting back to orange alert for a second, what are DOJ's responsibilities in an orange alert situation? I mean, we know what TSA does, DHS. What does the Justice Department do?

And also, do you plan to file any kind of response on the Padilla case? (Off mike) -halfway through the 30 days.

MR. COMEY: With respect to the orange alert, the Justice Department's role in general, obviously, is before the alert level is raised, the attorney general is part of any deliberations about raising that.

More generally, I hope you know what we do, and that is the men and women of the FBI and all of our agencies are out there working like crazy to try and keep the homeland safe. I can't answer it other than—as broadly as that. A lot of people's holidays have not been holidays because of the effort they've been putting forth, and I hope people remember that.

With respect to Padilla, I can't comment. I know we still have time on the clock, but I don't know exactly where it stands.

Eric?

Q: President Bush said, soon after the leak story broke, that he wasn't sure that the leaker would ever be caught. I know you can't talk about specific suspects that you may be narrowing in on, but in general, are you confident that this case is going to result in a prosecution?

MR. COMEY: That's not a characterization I can make. I wouldn't do it about any case, but I'm not going to do it about this case. All I can tell you is that I'm confident that the facts will be found professionally and that the judgments will be

made by someone with impeccable judgment and impartiality, and that is Mr. Fitzgerald.

Yes, ma'am?

Q: Have you set a budget for Mr. Fitzgerald's office? And—well, that's it.

MR. COMEY: The answer is no.

Mr. Fitzgerald's office has a budget, which he no doubt—as U.S. attorney—no doubt thinks is too small. And that's what I meant when I said resources. If he needs people or money or chairs or sticky pads, he can come back to me or to Assistant Attorney General Ray and we'll make sure that he gets it. I would expect that because he's already in the Department of Justice, we already have a team in place, he'll at least be able to draw on some, maybe all, of those resources and supplement them. He happens to run one of the best U.S. attorney's offices in the country, and he has senior people with great experience in a host of issues that might be relevant. So I would expect he'd draw on those troops.

Q: So there won't be a separate budget for this independent investigation?

MR. COMEY: No.

Yes, ma'am?

Q: He's just building on what Mr. Dionne (sp) has already completed; is that correct? And what happens to Mr. Dionne (sp)? Will he work for Mr. Fitzgerald? Will he continue to play an important role in this investigation since he's conducted the majority of the investigation to this point?

MR. COMEY: Well, that's a judgment for Mr. Fitzgerald to make as to what he builds on, what he does. I'm sure he knows of Mr. Dionne's (sp) reputation just as I do. But again, I don't want to prejudge that. It's entirely his call as to how he staffs it.

Like I said, I wouldn't be surprised if he thought maybe he ought to keep some or all of the career folks involved.

I know that one of the things that makes Mr. Fitzgerald a great prosecutor is that he works quickly. He understands that justice delayed is not a good thing. So I would expect—and that's one of the things that made me prefer this over an outside option. Mr. Fitzgerald can be here—(snaps his fingers)—like that to pick up this ball and to run with it, which would not be possible with the alternative.

Q: (Off mike)—bring people from Chicago—(off mike)—to Washington?

MR. COMEY: The answer to that is I don't know. And I really would not presume to tell him that. I'm giving him a broad mandate and saying this is your charge.

Yes, sir?

Q: A quick question. Eric asked if you were confident that you could—that you might be able to prosecute the leaker. That's a pretty high standard of proof. Are you confident that you will be able to identify the leaker or leakers?

MR. COMEY: Same answer I gave Eric, which I hope was vague and noncommittal. Thank you, folks.

(end transcript)

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF SCOTT ARMSTRONG

(Russell) Scott Armstrong, being duly sworn, deposes and says:

1. I have been a professional journalist for 30 years. I am the executive director of the Information Trust, a Washington, DC-based, not-for-profit organization devoted to improving the quality of journalism. I worked for *The Washington Post* as a reporter covering national security matters from 1976 through 1985. I have worked for many national newspapers, television and radio networks in the course of my career. Along with Bob Woodward, I wrote *The Brethren*, a narrative account of the Supreme Court from 1969 through 1976 describing the Court's inner workings. I assisted Bob Woodward and Carl Bernstein in the research and writing of *The Final Days*. I taught journalism as a visiting scholar at the American University School of Communication and have lectured on journalism and/or investigative techniques at various other institutions including: Brown University, Columbia University Graduate School of Journalism, Harvard University, George Mason University, George Washington University, Georgetown University, Pennsylvania State University, Princeton University, University of Scranton, Syracuse University, the Universities of California (Berkeley, Davis, UCLA, USC), University of Illinois, Indiana University, Uni-

versity of Maryland, University of Pennsylvania, University of Texas, University of Virginia, as well as law schools at Columbia, Duke, Georgetown, Harvard, Washington School of Law, University of Virginia, and Yale.

2. I make this affidavit in support of Judy Miller in connection with her filing concerning whether she should be compelled to disclose the identity of certain confidential sources with whom she spoke while engaged in news-gathering.

3. In addition to my extensive reporting on national security matters, I am the coconvener with former CIA general counsel Jeffrey Smith of the ongoing "Dialogue between the Media and the Intelligence Community on Unauthorized Disclosures." In the Dialogue, representatives of the media and senior government officials have met periodically to discuss issues surrounding the media's relationship with confidential sources employed by the government.

4. In 1985, I founded the National Security Archive, a private, non-profit research institute, which makes available to journalists, historians, scholars, congressional staffs, present and former public officials, other public interest organizations and the general public comprehensive government documentation pertaining to important issues relating to foreign and national security policy.

5. In addition, I have been invited to address issues relating to government secrecy and the unauthorized disclosures (leaks) by such official organizations as The First Judicial Circuit Court Conference, the National Security Agency's Senior Seminar, the Defense Investigative Service and the Defense Security Service, the National Defense University, the National War College, the Naval War College, the Foreign Service Institute, the National Industrial Security Program, the National Archive and Record Administration, the U.S. Security Policy Board, the General Accounting Office, the Congressional Research Service and the Commission on Protecting and Reducing Government Secrecy. I have testified or consulted with com-

mittee staff on related issues for such congressional committees as the Senate Select Committee on intelligence, the Senate Judiciary Committee, the House Permanent Select Committee on Intelligence; the House Armed Services Committee, the House Appropriations Committee and such unofficial organizations as the American Bar Association's Committee on National Security, American Society for Industrial Security and the American Society of Access Professionals. I have also lectured on myriad occasions to groups of professional journalists on matters relating to leaks and national security information including: the American Society of Newspaper Editors, the Society of Professional Journalists, the Investigative Reporters and Editors, the Radio and Television News Directors Association, the Associated Press Managing Editors, the National Newspaper Association, the Newspaper Association of America, the Freedom of Information coalitions in Illinois, Indiana, New York Oklahoma, as well as the full gamut of library associations including national and regional groups affiliated with the American Library Association, the Association of Research Libraries, the American Association of Law Libranans and the Society of Archivists. I have also been a board member and consultant to the Government Accountability Project, a whistleblower protection organization, which often assists government employees who have become confidential sources to other branches of government or the media on matters involving fraud, waste, abuse and government improprieties.

6. I have been qualified as an expert witness in the use of secret or classified documents in daily journalism by federal District Judge Joseph Young in the case of *U.S. v. Morison, 655* (D.Md. 1985). I was qualified as an expert witness in media coverage, use of confidential sources and libel by Federal District Court Judge Ewing Werlein, Jr. in *MMAR Group, Inc. v. Dow Jones Co., Inc.*, 987 F.Supp. 535 (S.D. Texas, Houston Division, 1997), by Judge Geoffrey Alprin in *Prentice v. McPhilemy,* 27 Med. L. Rptr. 2377 (D.C. Sup. Ct. 1999) and by Texas District Court Judge Joseph H Hart in *Jack Taylor, et al.*

v. Barn Switzer, et al., (No. 4-91-001; 126th District Travis County) and in numerous other federal and state cases involving issues of confidential sources. I was qualified as an expert witness in the analysis of media coverage and editorial decision-making in regard to venue issues by Chief Judge Richard P. Matsch in U.S.A v. Timothy James McVeigh and Terry Lynn Nichols (No. CR-95-1 10 MH MEMORANDUM OPINION AND ORDER ON MOTIONS FOR CHANGE OF VENUE; US District Court of Colorado sitting in US Western District of Oklahoma by designation) and have prepared and submitted testimony for introduction in other federal court cases on media coverage and editorial decision making as they relate to venue issues.

7. I have been the plaintiff in a number of federal cases designed to preserve and to increase access to classified and sensitive government information and to contest the failure to declassify government information. My involvement has included the selection of special masters with high level government clearances and the preparation of expert testimony.

8. In the course of my experience as a reporter, I have maintained confidential source relationships with thousands of present and former US government and private sector employees. The purpose of these relationships is to get and verify accurate information. In order to promote a free and candid relationship with confidential sources, I have frequently found it necessary to guarantee them anonymity in regard to information provided about classified or otherwise confidential and sensitive information. Much of the verification process could not be done without the guarantee of anonymity. Over the course of three decades, such guarantees of confidentiality, when used to confirm information with multiple confidential sources, have proven to my satisfaction that this process yields more candid and accurate information than to rely solely or predominantly on public or official comments or documentation. In order to secure and sustain cooperation of a series of sources on an issue or topic, the sources must be confident that the full

extent of their cooperation and role will remain anonymous and that they will not be subjected to professional recriminations, chastisement or in very rare cases, even prosecution.

9. Many sources require such guarantees of confidentiality before any extensive exchange of information is permitted. In my experience, even in public and private institutions that are known for their transparency and openness, officials and staff often require such guarantees of confidentiality before discussing sensitive matters such as major policy debates, personnel matters, investigations of improprieties and financial and budget matters.

10. Many types of reporting require the use of confidential sources. Prominent among these uses are three types of investigative or "enterprise" journalism: (a) original investigative reporting, which involves reporters developing factual accounts and documentation unknown to the public; (b) interpretive investigative reporting, which takes a mix of known facts and new information and produces an interpretation previously unavailable to the public; and (c) reporting on investigations, which publicizes information developed in government investigations that has not been known to the public and might well be suppressed.[1] These different types of investigative reporting are often mixed in the reporting of a single story. They share one key feature: to verify information, the journalist applies enterprise and initiative to examine information from as many knowledgeable and often confidential sources as can be developed.

11. Some information communicated under confidentiality arrangements will include significant "details" or "secrets." At other times the information communicated simply amounts to candid, relevant background information, context and detailed

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[1] For a coherent description of these types of reporting see pp. 116-129, *The Elements of Journalism: What Newspeople Should and the Public Should Expect* by Bill Kovach and Tom Rosenstiel, Three Rivers Press, 2001.

leads, which in turn allow other information to be sought from yet other sources. Each confidential relationship with a source may provide one or more individual details which eventually are distilled and woven into a comprehensive news story. It would be rare for there not to be multiple sources—including confidential sources—for news stories on highly sensitive topics. The important "enterprise" stories tend to be built on information elicited from and verified with multiple confidential sources.

12. Daily reporting most often does not enjoy the same amount of reporting time and flexibility as the investigative enterprise methods outlined above. Journalists on daily deadlines therefore often make use of confidential sources to report on daily developments in government and other institutions. These confidential relationships are necessary for reporters because even official government pronouncements must be verified before they are published. Official news conferences, daily news briefings, government reports and studies require further checking by reporters. Traditionally, journalists will talk with other knowledgeable officials who are not authorized to speak to the subject but are individuals with whom they have developed a track record of candor and confidence. In some instances, this additional briefing goes beyond corroboration to add perspective that can be helpful to the reporter in writing a story but which the individual (or even the government) will not permit to be attributed by name or even position or sometimes even quoted directly in any way. Publicly available or acknowledged information may in turn prompt more detailed or relevant information from a confidential source, which may in turn lead back to additional on-the-record acknowledgments, which increase the pool of accurate and verifiable public information and/or may lead to yet more information from other confidential sources. Thus in daily journalism, as in investigative enterprise journalism, information essential to the verification of facts within a story may come from confidential sources in the form of unique and relevant, contextual comments, which become part of the process of expanding, correcting, confirm-

ing or contradicting what other public and confidential sources have said. Thus, a relationship with the confidential source permits the authentication of the public information. The maintenance of confidential sources is therefore essential to daily journalism.

13. The broad use of secrecy in government and in the corporate and institutional world creates a need for journalists to rely on confidential sources. In the national security community. the compulsory addition of security clearances, information classification, safeguards, nondis-closure agreements, security monitoring, polygraphs, special-access programs and compartments all inhibit the disclosure of information—even nonsensitive details—through routine means. Since virtually everything is classified, the verification of something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so. In journalism, stories about major national security or diplomatic policy or military activities warrant confirmation, contextual perspective and detailed elaboration. In order to provide readers with information as accurate and verified as possible, reporters often find it only available from confidential sources. At one time or another, the vast majority of high level government officials become confidential sources. In my experience, they understand that the efficient operation of government and minimal standards of accountability to the public require that they provide confidential briefings to journalists covering daily stories. Moreover, important events about government that are embarrassing to senior officials, to important government agencies and/or a presidential administration are almost always cloaked in multiple layers of secrecy, more often than not for political rather than national security reasons.

14. For example, illegal or unauthorized intelligence activities, fraud, waste and abuse within military budgets and operations that are diplomatically or politically sensitive are similarly kept from public view behind a national security ratio-

nale. The highest ranking government official may prefer to be a confidential source in order to communicate candidly to an oversight committee of Congress, through the press, a difference of opinion within the same department or administration. On a daily basis, official secrecy's overly broad use excludes not only the public, but also other agencies and even whole branches of government, from an accurate perception of policy and practice. Confidential sources often are the only manner in which this hodge-podge of sensitive and non-sensitive national security information can be conveyed to the public.

15. In cases involving classified or officially-restricted federal government information. journalists customarily seek to develop confidential sources among officials and their staffs in multiple executive branch agencies and in multiple offices of congressional members, among the members, their personal staff and their committee staff members. Stories often develop as a result of the alternative flow of information to the reporter from congressional and executive branch offices. Congressional oversight responsibilities enable congressional officials and their staffs to request information and entitle them to receive briefings on most details. Since congressional investigators often conduct their own field research, the intellectual process that develops information often includes a symbiotic relationship between journalists and congressional investigators. Some information that would not normally be available to journalists can be secured by congressional investigators. Other information that congressional investigators cannot get candidly reported by executive branch officials can be secured by reporters in confidential interviews. A similar interaction between reporters and executive branch investigators can also exploit the ability of executive branch investigators to get information from suspects or from documents not available to reporters and, in turn, the ability of reporters to get more complete and candid information from other officials on confidential interviews. The symbiotic interaction between journalists, congressional and executive officials has become the norm in

the daily exercise of the First Amendment in dealing with the government at many levels.

16. Executive agencies of the federal government regularly require journalists, who report on national security, to conduct much of their work by interviewing officials and former officials on background (without direct attribution) or deep background (with guarantees of anonymity). In my experience, these agencies include the Department of Defense. the Central Intelligence Agency. the Defense Intelligence Agency, the military services, the Department of Homeland Security, the Department of Commerce, the Department of Energy, the Department of Justice, the Department of State, the Department of the Treasury, the National Security Council, the Homeland Security Council and the White House. Officials from these organizations typically say far more on background, deep-background or off-the-record (a category which had traditionally meant the information could not be pursued for a news story, but which has come to mean the equivalent of deep background) than is ever said on the record. These are "authorized" disclosures, which agencies insist be conducted on background or deep background precisely to avoid specific accountability for any government official. Professional journalists find it necessary to obtain verification, perspective, correction and commentary on these official leaks by others not authorized to comment on the officially authorized disclosure. This system is largely of the government's making, but requires the media to comply with the requests for anonymity or be excluded from essential information.

17. Ideally every statement and assertion in news articles would be ascribed to a specific source either by naming the individual or by providing an explicit indication of the individual's position, affiliations, and an indication of the source's knowledge or perspective about the events or policy reported upon. But because it is necessary to protect the identity and the identifying characteristics of the employment of a source, in some

instances, a confidential source may be quoted publicly and officially by name and position in a story, while the story does not disclose that the source provided additional material anonymously. In such a case, reporters will normally attempt to guide the reader as candidly as possible to a conclusion about the degree of confidence that is warranted in the source for any specific statement.

18. Once a decision has been made to protect the identity of a confidential source, it is extremely unusual for journalists to reveal their own confidential sources. I know of no instances where journalists or editors have cooperated with a leak investigation and revealed the identity of a source. Most journalists operate on the assumption that they will not reveal sources even under the possibility of being held in contempt for refusing to comply with an order to reveal their sources. Journalists customarily take precautions to prevent intentional or inadvertent disclosures by their colleagues or their editors.

19. In my professional opinion, were an order to compel disclosure of sources to be issued and were it to be obeyed, it would do catastrophic damage to the quality of information available on national security issues. It would also unsettle an untidy but well-established accommodation between government institutions and the media that allows critically important information to surface publicly in an era when secrecy classification and other governmental controls technically cover almost everything and are often used to shape or limit public debate and understanding.

/s/ Russell Scott Armstrong
Russell Scott Armstrong

Witnessed this 19th day of August, 2004

/s/ Notary Public
(notary public)

My Commission Expires 2/22/06

EXHIBIT E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF JACK NELSON

Jack Nelson, being duly sworn, deposes and says:

1. Prior to my retirement at the end of 2001, I spent 36 years as a journalist with the *Los Angeles Times*, including 22 years as the *Times'* Washington Bureau Chief. Before I began working for the *Los Angeles Times, I* worked as a reporter for *The Atlanta Journal-Constitution* and *The Biloxi Daily Herald. In* 1960, I was awarded a Pulitzer Prize for reporting that involved confidential sources and exposed widespread financial corruption and medical malpractice at the Milledgeville (Ga.) State Hospital, then the world's largest mental institution. Much of my career has been spent either doing investigative reporting or overseeing investigative reporting. I have used confidential sources at all levels of government to report on financial corruption, vote fraud, medical malpractice, and other wrongdoing. I am, through these experiences, personally familiar with news reporting in general, and with the importance of confidential sources in newsgathering, in particular.

2. I make this affidavit in support of the memorandum of *New York Times* reporter Judith Miller in connection with his filing concerning whether he should be compelled to disclose the

identity of certain confidential sources with whom he spoke while engaged in newsgathering.

3. *The Los Angeles Times* has been publishing a daily newspaper since 1881. Its daily circulation is approximately 1 million and its Sunday circulation is approximately 1.39 million.

4. I have utilized and protected confidential sources throughout a career of more than 50 years as a journalist. During that time, I have found it essential to use confidential sources to adequately report and keep the public informed of government at the local, state and national level. In order to fully report stories on many subjects, especially in order to learn of government activities that otherwise would have been shielded from the public, I often found it necessary to rely on confidential sources.

5. I have covered the activities of six different presidential administrations—four Republican and two Democratic—and have directed the Washington bureau's coverage of five of them. And in all of the administrations we had to rely on confidential sources in reporting on government developments that were of great public interest but that government officials tried to keep concealed.

6. In Washington, my own reporting and the reporting of staffers I've directed routinely disclosed governmental abuses of one kind or another based on solid sources who insisted on confidentiality for fear of reprisal if their identities became known. Without those sources the *Los Angeles Times* would have been unable to report numerous such stories involving corruption or governmental abuses in at least six administrations. Examples include: disclosures aspects of the Watergate scandal and abuses of power of the FBI and other federal agencies in the Nixon Administration; questions surrounding President Ford's pardon of Nixon; scandals in the Carter Administration involving OMB Director Bert Lance and President Carter's brother Billy Carter's representing Libya; illegal and inappropriate payments and cover-up attempts in the Iran/Contras scandal in the

Ronald Reagan Administration; President George H.W. Bush's role in the Iran/Contras scandal and other wronging in his Administration; and lies told by President Clinton in the Monica Lewinsky scandal.

7. A reporter who obeys a court order to disclose a source to whom he has promised confidentiality would seriously damage his ability to cover government in the future. Other government sources who insist on confidentiality and hear news about a reporter outing a confidential source obviously would consider that reporter and perhaps other reporters as untrustworthy and refuse to deal with them in the future. And it undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing.

8. In fact, high government officials from presidents on down routinely have leaked classified information when it has promoted their agenda or otherwise suited their purposes. Any reporter who has covered Washington for any length of time knows that officials routinely leak classified information. Some government public information officials have publicly acknowledged that they routinely use classified information in briefing reporters. Congress passed a bill cracking down on leaks in 2000, but President Clinton vetoed it after Kenneth Bacon, the Assistant Secretary of Defense for Public Affairs, and Strobe Talbot, the Deputy Secretary of State, told the President they routinely used classified information in briefing reporters and could not adequately do their jobs if the bill became law. Bacon told the *Washington Post* the measure was "disastrous for journalists . . . disastrous for any official who deals with the press in national security, whether at State, the NSC or the Pentagon." And Talbot told me, for a paper on government secrecy that I wrote while at Harvard University as a Shorenstein Fellow in 2001, that the bill was "unbelievably pernicious for all kinds of reasons." The paper was a chapter in a 2003 book, "Terrorism, War, and the Press," published by the Joan Shorenstein Center

on the Press, Politics and Public Policy and the John F. Kennedy School of Government.

9. Finally, I believe a federal court order, as part of the investigation into the possible disclosure of a CIA operative's name, that punishes reporters or their news organizations for refusing to divulge confidential sources would be closely watched by all government sources and potential sources who might be inclined to help the public know how its government is operating, and if the punishment were to compel a reporter to reveal his source, it would have a chilling effect on sources and not only damage the reporter's ability to do his job, but the ability of all reporters covering government to do their jobs.

/s/ Jack Nelson
Jack Nelson

Date: August 19, 2004

Witnessed this 19th day of August, 2004

/s/ Notary Public
(notary public)

My Commission Expires 3/31/07

EXHIBIT F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: SPECIAL COUNSEL INVESTIGATION
Before J. Thomas Hogan
[Docket No. Under Seal]

AFFIDAVIT OF ANNA NELSON

Anna Nelson, being duly sworn, deposes and says:

1. I am Anna Kasten Nelson, the Distinguished Historian in Residence at the American University in Washington, D.C., where I teach courses related to the history of U.S. Foreign Policy. I have also taught history at George Washington University and Tulane University and was a Distinguished Visiting Professor in history at Arizona State University in 1992. I have also been a member of the staff of the Public Documents Commission which was formed after President Nixon's efforts to destroy his tapes and the United States State Department Historical Advisory Committee. I was one of five presidential appointees to the John F. Kennedy Assassination Records Review Board. Each of these was formed to release historical records to the public.

2. I make this affidavit in support of *New York Times* reporter Judith Miller in connection with his filing concerning whether he should be compelled to disclose the identity of certain confidential sources with whom he spoke while engaged in newsgathering.

3. Since filing my first Freedom of Information Request approximately 25 years ago, I have also personally been a vocal proponent of opening historically valuable records. Nevertheless, I am supporting the subpoenaed reporters in the current grand jury investigation who have refused to release the names of confidential sources.

4. Historians no longer limit themselves to writing about past centuries. The position of the U.S. as a world power in the last half century has brought countless monographs to library bookshelves and articles in scholarly and public interest journals. For the most part, the traditional sources of historians such as government records are not open to researchers for 25 to 30 years and then are often censored for purported national security information or privacy. Thus it is journalism that often provides the first cut of history to researchers seeking to understand the immediate past. Newspapers are regarded as a primary source and journalists who write for them also write for history. Recently (January 2004) I published an article about a woman chosen by Secretary of Defense George Marshall to be an Assistant Secretary in the Defense Department in 1950. She was attacked by supporters of Sen. Joseph McCarthy. Among my most important sources were the three articles published in the *Washington Post* at that time by a journalist whose sources were not identified. Those articles helped me determine that masked by false accusations of communist party membership was a deep anti-Semitism among her opponents. The journalist informing his readers also was in an unique position to inform future historians.

5. Requiring journalists to reveal the identities of their sources would impoverish our knowledge of contemporary history since confidential sources are often the only sources available to the journalist and thus the original source for historians seeking to unravel public policy or foreign policy. A journalist's exposure of the My-Lai incident is just such an example. The journalist did not reveal his sources and as a consequence his-

torians have deepened their view of the way in which the war in Vietnam was fought. See, for example, David Anderson's *Facing My Lai* (1995).

6. The sources used by journalists are also important to counter the deliberate leaks from the government that are designed to influence the public. The eminent statesman and historian, George Kennan, once told me in an interview that our government was like a volcano. It only leaked from the top. That information, amplified by the memoirs of policy makers, would be our only source if journalists were required to open all their files. Certainly historians who will one day study the war in Iraq will be grateful that they can check both the official and leaked accounts with those of Seymour Hersh, Jon Lee Anderson and others who are on the scene.

7. If the reporters in this case are required to name their sources, government officials will be alerted to the fact that journalists will no longer be able to speak out to reveal fraud, deception or just the description of controversial events. Everyone would suffer from that chilling effect: the public, journalists and historians.

8. At the very beginning of our country, James Madison wrote, "It has been a misfortune of history that *a personal knowledge* and an *impartial judgment* of things can *rarely meet* in the historian. The best history of our country therefore must be the fruit of contributions bequeathed by contemporary actors and witnesses, to successors who will make an unbiased use of them."

/s/ Anna Nelson
Anna Nelson

Date: 8/19/04

Witnessed this 19th day of August, 2004

/s/ Notary Public
(notary public)

My Commission Expires 3/31/07

Supreme Court, U.S.
FILED
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Nos. 04-1507 and 04-1508

In the Supreme Court of the United States

JUDITH MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

MATTHEW COOPER AND TIME INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, if there is a qualified reporter's privilege in the grand jury context, as the court of appeals assumed for purposes of resolving this case, the court of appeals properly found that the privilege was overcome on the facts of the case.

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In the Supreme Court of the United States

No. 04-1507

JUDITH MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 04-1508

MATTHEW COOPER AND TIME INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Miller Pet. App. 1a-77a; Cooper Pet. App. 1a-85a) is reported at 397 F.3d 964. The opinions of the district court denying petitioners' motions to quash (Miller Pet. App. 81a-86a, 87a-97a; Cooper Pet. App. 86a-97a, 101a-107a, 111a-115a) are reported at 332 F. Supp. 2d 26, 338 F. Supp. 2d 16, and 346 F. Supp. 2d 54. The orders of the district court holding petitioners in civil contempt (Miller Pet. App. 78a-79a; Cooper Pet. App. 108a-110a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2005. A petition for rehearing was denied on April 19, 2005 (Miller App. 98a-103a; Cooper Pet. App. 116a-122a). The petition for a writ of certiorari in No. 04-1507 was filed on May 9, 2005, and the petition for a writ of certiorari in No. 04-1508 was filed on May 10, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. During the spring and summer of 2003, a controversy arose concerning a statement made by President George W. Bush during the State of the Union address delivered on January 28, 2003. Miller Pet. App. 3a. In that address, President Bush stated: "The British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa." *Ibid.*

The accuracy of this statement, later colloquially referred to as the "16 words," was called into question by a series of articles, including an op-ed piece by Joseph C. Wilson IV, a retired career State Department official, which was published in the *New York Times* on July 6, 2003. Miller Pet. App. 3a, 183a-187a. In the op-ed piece, Wilson asserted that he had taken a trip to Niger in 2002 at the request of the Central Intelligence Agency (CIA) to investigate a report that Iraq had sought or obtained uranium from Niger, and that he had reported to the CIA upon his return his conclusion that it was "highly doubtful that any such transaction had ever taken place." *Id.* at 183a-184a. Wilson asserted that "some of the intelligence related to Iraq's nuclear weapons program was twisted to exaggerate the Iraqi threat." *Id.* at 183a.

Eight days later, on July 14, 2003, syndicated columnist Robert Novak published a column in the *Chicago Sun-Times* in which he asserted that "two senior administration officials" told him that Wilson had been selected for the Niger trip at the suggestion of Wilson's wife, whom Novak described as a CIA "operative on weapons of mass destruction." Miller Pet. App. 188a-189a.

After Novak's column was published, it was reported that other reporters had been told by government officials that Wilson's wife worked at the CIA monitoring weapons of mass destruction, and that she was involved in her husband's being sent to Africa. Miller Pet. App. 4a. Among the articles that related this information was an article contributed to by Matthew Cooper and published by Time.com on July 17, 2003, and later in print. *Ibid.* The article stated that "some government officials have noted to Time in interviews * * * that Wilson's wife, Valerie Plame, is a CIA official who monitors the proliferation of weapons of mass destruction * * * [and] have suggested that she was involved in her husband's being dispatched to Niger to investigate reports that Saddam Hussein's government had sought to purchase large quantities of uranium ore." Matthew Cooper et al., *A War on Wilson?*, TIME.com (July 17, 2003), *available at* http://wwwtime.com/time/nation/article/0,8599,465270,00.html. In addition, on September 28, 2003, the *Washington Post* reported that, in the July 2003 time frame, "two top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson's wife." Miller Pet. App. 4a.

2. In the fall of 2003, the government began an investigation into whether federal law had been violated in connection with the unauthorized disclosure by gov-

ernment employees of information concerning the identity of a purported CIA employee. Miller Pet. App. 4a. In late December 2003, the Attorney General recused himself from the investigation, and delegated his authority in connection with the investigation to Deputy Attorney General James B. Comey as Acting Attorney General. *Id.* at 4a, 192a-193a. Deputy Attorney General Comey, in turn, appointed Patrick J. Fitzgerald, United States Attorney for the Northern District of Illinois, as Special Counsel, and delegated full authority concerning the investigation to him. *Ibid.* The grand jury investigation began in January 2004. *Id.* at 4a.

During the period January through May 2004, the grand jury conducted an extensive investigation. Miller Pet. App. 5a. Beginning in May 2004, it was determined that it was necessary to obtain testimony and documents from a limited number of reporters, including Matthew Cooper of Time Inc. (Time), and Judith Miller of the New York Times, in connection with the investigation. Gov't C.A. Br. 3, 7-8, 10. In accordance with Department of Justice guidelines on the issuance of subpoenas to members of the news media, 28 C.F.R. 50.10, the Special Counsel first sought Cooper's and Miller's voluntary cooperation. However, the reporters refused to provide the requested information voluntarily. Gov't C.A. Br. 3.

3. a. On May 21, 2004, a grand jury subpoena was issued to Matthew Cooper seeking testimony and documents related to articles published on July 17, 2003 and July 21, 2003 to which he had contributed. Miller Pet. App. 5a. Cooper refused to comply with the subpoena, even after the Special Counsel offered to narrow its scope to cover only conversations between Cooper and a specific individual identified by the Special Counsel.

Ibid. On June 3, 2004, Cooper moved to quash the subpoena. *Ibid.* In response, the government argued that the law did not support the application of a reporter's privilege in the context of a good faith grand jury investigation and that, even if the court were to apply a qualified privilege, compliance with the subpoena would be required. Gov't C.A. Br. 4. Although the government took the position that it was not legally required to make any factual showing prior to demanding compliance with the subpoenas, in order to assure the district court that the subpoenas were appropriate, the government submitted, *ex parte* and under seal, detailed summaries of evidence gathered during the course of the investigation, with specific references to grand jury witness testimony, and materials identified as "classified." *Ibid.*

On July 6, 2004, the district court denied Cooper's motion and, on July 20, 2004, it issued a written opinion and order. Miller Pet. App. 87a.[1] In the July 20, 2004 opinion, the district court concluded that this Court, in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), had rejected any reporter's privilege rooted in the First Amendment or common law in the context of a grand jury acting in good faith (Miller Pet. App. 90a), and that, even were the court to determine that the reporters did possess a qualified privilege, the Special Counsel's *ex parte* evidentiary submission "would be able to meet even the most stringent of balancing tests" (*id.* at 96a). In addition, the district court held that, while it was not convinced that the Department of Justice guidelines

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[1] Cooper's motion was decided with a motion to quash filed by NBC correspondent Tim Russert. Miller Pet. App. 87a. Russert elected to comply with the subpoena directed to him after his motion to quash was denied.

"vested any right" in the reporters, the guidelines were "fully satisfied" by the facts presented by the Special Counsel. *Ibid.*

A subpoena was issued to Time for the same documents requested from Cooper. Miller Pet. App. 5a. Time moved to quash the subpoena, and its motion was denied on August 6, 2004. *Ibid.*

Despite the denial of their motions to quash, Cooper and Time refused to comply with the subpoenas. Miller Pet. App. 5a. On August 9, 2004, after a hearing, the district court found that Cooper and Time had refused to comply with the subpoenas without just cause, and held them in civil contempt of court. Cooper Pet. App. 98a.

After being held in contempt, and after filing notices of appeal, Cooper and Time agreed to comply with the subpoenas, as limited by the Special Counsel, with the Special Counsel explicitly reserving the right to seek additional testimony and documents from Cooper and Time, if necessary. Miller Pet. App. 5a. Cooper indicated that his rationale for agreeing to provide testimony and documents pursuant to this agreement was the fact that the source had stated that he had no objection. *Ibid.* After Cooper and Time fulfilled their obligations under the agreement, the district court's contempt order was vacated, and Cooper's and Time's notices of appeal were voluntarily dismissed. *Ibid.*

b. On September 13, 2004, the grand jury issued a second set of subpoenas to Cooper and Time seeking testimony and documents relating to "conversations between Matthew Cooper and official source(s) prior to July 14, 2003, concerning in any way: former Ambassador Joseph Wilson; the 2002 trip by former Ambassador Wilson to Niger; Valerie Wilson Plame a/k/a Valerie Wilson a/k/a Valerie Plame (the wife of former Ambas-

sador Wilson); and/or any affiliation between Valerie Wilson Plame and the CIA." Miller Pet. App. 5a-6a.

Cooper and Time moved to quash these subpoenas and, on October 7, 2004, after briefing and a hearing, the district court denied their motions. Cooper Pet. App. 108a. In a memorandum opinion dated November 10, 2004, the district court relied on the grounds stated in the court's July 20, 2004 opinion, and on the additional ground that the new subpoenas "stem[med] from legitimate needs due to an unanticipated shift in the grand jury's investigation," were not issued in an attempt to harass, and thus were not unreasonable or oppressive. *Id.* at 111a-115a. On October 13, 2004, after a hearing, the district court held Cooper and Time in civil contempt of court based on their refusal to comply with the subpoenas. *Id.* at 108a-110a.

4. On August 12 and August 20, 2004, grand jury subpoenas were issued to reporter Judith Miller and the New York Times, seeking documents and testimony related to conversations between Miller and a specified government official occurring between on or about July 6, 2003 and on or about July 13, 2003, "concerning Valerie Plame Wilson," whether referred to by name or by description, "concerning Iraqi efforts to obtain uranium." Miller Pet. App. 115a-119a. Miller refused to comply with the subpoenas and, instead, moved to quash them on the same grounds previously asserted by Cooper and Time. *Id.* at 6a. The New York Times indicated that it was in possession of no documents responsive to the subpoena. Gov't C.A. Br. 10.

After briefing and a hearing, the district court denied Miller's motion to quash, on the grounds set forth in its July 20, 2004 opinion. Miller Pet. App. 80a-86a. Like Cooper and Time, Miller persisted in refusing to comply with the subpoenas, and the district court therefore

held her in civil contempt of court as well. *Id.* at 78a-79a.

5. Cooper, Time and Miller brought a consolidated appeal to the United States Court of Appeals for the District of Columbia Circuit. On February 15, 2005, a panel of the court of appeals affirmed the orders of the district court, with all three members of the panel voting to affirm. Miller Pet. App. 1a-77a.

The panel was unanimous in its rejection of petitioners' claimed First Amendment privilege in the grand jury context. In the opinion for the court authored by Judge Sentelle, the panel thoroughly analyzed *Branzburg* v. *Hayes*, *supra*, and, finding no material distinction between the facts of *Branzburg* and those of the case before the court of appeals, held that *Branzburg* foreclosed petitioners' claim of protection based on a reporter's privilege rooted in the First Amendment. Miller Pet. App. 7a-15a.

With respect to petitioners' request that the court recognize an absolute reporter's privilege rooted in federal common law, the panel was unanimous in ruling out the existence of such a privilege. Miller Pet. App. 15a, 76a-77a. With respect to petitioners' alternative argument for a qualified privilege, the panel was "not of one mind" concerning the existence of such a privilege. Miller Pet. App. 15a. The court explained that Judge Sentelle "would hold that there is no such common law privilege," that Judge Tatel "would hold that there is such a common law privilege," and that Judge Henderson "believes that we need not, and therefore should not, reach that question." *Ibid.*

The panel also unanimously agreed that, using the formulation of a qualified common law privilege suggested by Judge Tatel, the privilege was overcome and, therefore, that the district court's decision should be

affirmed. Miller Pet. App. 15a, 22a, 31a, 77a.[2] Judge Tatel, who alone favored recognition of a common law reporter's privilege, applied the standard he had formulated to the facts of the case and determined, after "carefully scrutiniz[ing] [the special counsel's] voluminous classified filings," that, "based on an exhaustive investigation, the special counsel has established the need for Miller's and Cooper's testimony," and that, "considering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." Miller Pet. App. 64a, 75a.[3]

Finally, the panel unanimously rejected petitioners' claim that the district court had improperly considered the government's *ex parte* submissions of grand jury material, much of which was classified. Miller Pet. App. 18a. The court held that the procedure employed by the district court was necessary to protect grand jury secrecy, and was fully consistent with binding prece-

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[2] As "the controlling decision of the court," Judge Henderson's concurring opinion made clear that the Court had assumed, but not decided, that a qualified common law reporter's privilege exists and the "standard [that] would govern its application if it did." Miller Pet. App. 100a. Thus, future panels of the court were "free to recognize any privilege (or no privilege)." *Ibid.*

[3] Judge Tatel's opinion described in detail the facts that led him to conclude that the privilege had been overcome. Because that portion of his opinion refers to classified grand jury information from the *ex parte* submissions, it is redacted from the court's published opinion. It is our understanding that the redacted portion of Judge Tatel's opinion is available to this Court from the Deputy Marshal, through the Department of Justice Litigation Security Section Security Specialist.

dent of the District of Columbia Circuit and this Court. *Id.* at 16a-18a.[4]

6. By October 2004, when the appeal was filed, the factual investigation—other than the testimony of Miller and Cooper and any further investigation that might result from such testimony—was for all practical purposes complete. Gov't C.A. Br. in Opp. to Pet. for Rh'g 3. After the court of appeals issued its decision, the parties agreed to a stay of its mandate, and to the expedited filing of the certiorari petitions and briefs in opposition thereto, in order to afford this Court the opportunity to consider the petitions before its summer recess. Pet. C.A. Mot. for Stay of Mandate 1.

ARGUMENT

1. Cooper and Time contend that "[t]his Court's guidance is necessary to determine the existence and scope of a reporter's privilege." Cooper Pet. 8. Miller likewise contends that this Court should grant "plenary review" to decide "[t]he scope—indeed the existence—of a reporter's privilege." Miller Pet. 20. It is the government's position, as stated in the court of appeals (Gov't C.A. Br. 33-41), that no federal common law reporter's privilege should be recognized in the context of a good faith grand jury investigation. However, the court of appeals assumed that petitioners prevailed on their claim that a qualified privilege exists, and assumed that the privilege has the broadest possible scope. The court merely held that any such privilege has been overcome on the particular facts of this case. Whether the court of appeals erred in applying the legal principle advocated by petitioners to the specific

[4] The court of appeals also held that the Department of Justice guidelines, 28 C.F.R. 50.10, were not judicially enforceable. Miller Pet. App. 18a-21a.

facts of this case is not a question that warrants this Court's review. See Sup. Ct. R. 10.

In an attempt to surmount this difficulty, petitioners contend that their due process rights were violated by the procedure employed by the court of appeals in reviewing the facts—namely, the consideration of *ex parte* materials. Miller Pet. 27-29; Cooper Pet. 27-29. Certiorari is not warranted on that issue either. The court of appeals correctly rejected petitioners' due process claim, and, as Judge Tatel correctly recognized in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the court of appeals' decision on that point does not conflict with any decision of this Court or any other court of appeals.

a. In reaching its unanimous holding affirming the finding that Miller, Cooper, and Time were in contempt of court for refusing to provide evidence to a grand jury, the court of appeals assumed *arguendo* the existence of a qualified reporter's privilege. The court then analyzed the evidentiary submissions of the Special Counsel, and, applying the assumed qualified privilege to the facts, unanimously concluded that the privilege had been overcome. Indeed, the court concluded that the government's affidavits and exhibits overcame even the special version of the privilege for "leak" cases favored by Judge Tatel, which required not only showings of the essentiality of the evidence sought and the exhaustion of alternative sources, but the court's balancing of "the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value." Miller Pet. App. 58a.

The portion of Judge Tatel's opinion joined by the entire panel "carefully scrutinized [the Special Counsel's] voluminous classified filings" and concluded that he had

"met his burden of demonstrating that the information is both critical and unobtainable from any other source." Miller Pet. App. 66a. The opinion concluded that the Special Counsel had not only established the need for Miller's and Cooper's testimony, but had satisfied what Judge Tatel viewed as the appropriate balancing test for "leak" cases: "[C]onsidering the gravity of the suspected crime and the low value of the leaked information, no privilege bars the subpoenas." *Id.* at 75a. Judge Tatel's opinion concluded: "Because identifying [petitioners'] sources * * * appears essential to remedying a serious breach of public trust, I join in affirming the district court's orders compelling their testimony." *Id.* at 77a.

Thus, although the court of appeals was "not of one mind on the existence of a common law privilege," the court was unified in concluding, "for the reasons set forth in the separate opinion of Judge Tatel, that if such a privilege applies here, it has been overcome." Miller Pet. App. 15a. As Judge Henderson's controlling opinion stated:

> Because my colleagues and I agree that any federal common-law reporter's privilege that may exist is not absolute and that the Special Counsel's evidence defeats whatever privilege we may fashion, we need not and therefore should not decide anything more today than that the Special Counsel's evidentiary proffer overcomes any hurdle, however high, a federal common-law reporter's privilege may erect.

Id. at 31a.

Cooper and Time call the conclusion of the court of appeals "deeply flawed" because (they say) "it makes no sense to deem the privilege 'overcome' without having *defined* the privilege." Cooper Pet. 25 n.7. This ignores

the fact that the court of appeals reached its holding by assuming the existence of a reporter's privilege the contours of which are described in great detail in Judge Tatel's opinion. See Miller Pet. App. 54a-64a (*Scope of the Privilege*). Indeed, as Judge Henderson observed (*id.* at 35a-38a), the version of the privilege formulated by Judge Tatel, with its balancing of the harm of the leak against the leaked information's value, erects a higher hurdle for the government than the privilege recognized by the District of Columbia Circuit in civil cases like *Zerilli* v. *Smith*, 656 F.2d 705, 713-714 (1981), which requires only showings of essentiality of the information and exhaustion of alternative sources. And it was the *Zerilli* version of the privilege that petitioners advocated in the court of appeals. Pet. C.A. Br. 42.[5]

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[5] Petitioners also claim that the decision of the court of appeals conflicts with this Court's decision in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), which recognized a psychotherapist/social worker privilege under Rule 501 of the Federal Rules of Evidence. Petitioners claim that the court of appeals "simply declined to engage in the analysis mandated by *Jaffe*" (Miller Pet. 26) and "misapplied *Jaffe*, in declining to recognize a common law [reporter's] privilege" (Cooper Pet. 19). Petitioners' contention thus appears to be that the court of appeals was mandated by *Jaffee* to decide whether there is a common law reporter's privilege (and decide that there is), even in a case where the court could assume the existence of such a privilege because it did not need to reach the issue to resolve the case before it. Petitioners' contention is without merit. Judge Henderson correctly concluded that the "doctrine of judicial restraint provides a fully adequate justification for deciding [the] case on the best and narrowest ground available." Miller Pet. App. 32a n.1. (quoting *Air Courier Conference of Am.* v. *American Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring in the judgment). In any event, in light of the court of appeals' conclusion that any privilege is overcome on the facts of this case, petitioners would be in the same position even if the court had explicitly recognized the privilege. This Court sits "to correct

b. In light of the court of appeals' decision, petitioners could prevail in this Court only if (1) there is an *absolute* reporter's privilege; (2) there is a qualified reporter's privilege broader in scope than that assumed to exist by the court of appeals; (3) the assumed qualified reporter's privilege was not overcome on the facts of this case; or (4) the court of appeals applied an improper procedure in deciding that the assumed qualified privilege was overcome. Petitioners do not make any of the first three arguments, and even if they did, none would provide a basis for certiorari.

In the court of appeals, in their joint reply brief and at oral argument, petitioners clarified that they were advocating (in the alternative) that the court create an absolute reporter's privilege protecting confidential sources. Pet. C.A. Reply Br. 15 n.7. The court of appeals unanimously rejected that argument: "[A]ll believe that if there is any such privilege, it is not absolute and may be overcome by an appropriate showing." Miller Pet. App. 15a. Judge Tatel, the only member of the panel who favored adoption of a qualified privilege based on the approach outlined in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), concluded that an absolute privilege would not be in the public interest:

> Leaks similar to the crime suspected here (exposure of a covert agent) apparently caused the deaths of several operatives in the late 1970s and early 1980s, including the agency's Athens station chief. *See Haig v. Agee*, 453 U.S. 280, 284-85 & n.7 (1981). Other leaks—the design for a top secret nuclear weapon, for example, or plans for an imminent military strike—could be even more damaging, causing

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wrong judgments, not to revise opinions." *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945).

> harm far in excess of their news value. In such cases, the reporter's privilege must give way. Just as attorney–client communications "made for the purpose of getting advice for the commission of a fraud or crime" serve no public interest and receive no privilege, *see United States v. Zolin*, 491 U.S. 554, 563 (1989) (internal quotation marks omitted), neither should courts protect sources whose leaks harm national security while providing minimal benefit to public debate.

Miller App. 56a.

Petitioners do not advocate an absolute reporter's privilege in this Court, nor could they persuasively do so. While a very small number of jurisdictions have adopted *statutory* reporter's privileges that appear, on their face, to give absolute protection to confidential sources, see, *e.g.*, D.C. Code § 16-4701 *et seq.*, local jurisdictions do not have responsibility for investigating crimes implicating national security, and reason and experience strongly counsel against adoption of an absolute reporter's privilege in the federal courts. In any event, no court has recognized an absolute reporter's privilege as a matter of federal common law.

As for the possibility of a qualified privilege broader than the version of the privilege that the court of appeals assumed to exist, petitioners did not suggest the existence of such a privilege in the lower courts, and they do not do so in this Court. Indeed, in the lower courts, petitioners advocated a narrower version of the qualified privilege than the one assumed to exist by the court of appeals, and it is hard to conceive of a broader version.

Nor do petitioners argue that, in holding that any qualified privilege has been overcome, the court of ap-

peals relied on erroneous factual findings or misapplied the assumed privilege to the facts of this case. In any event, this Court does not grant certiorari to review factual findings or decide whether a legal standard was correctly applied to the facts of a particular case.

c. Petitioners do argue that the lower courts employed an improper procedure in applying the assumed qualified privilege to the facts of the case—namely, the consideration of *ex parte* submissions that contained a detailed description of much of the evidence previously gathered by the grand jury. Miller Pet. 27-28; Cooper Pet. 27-29. Petitioners contend that they were entitled to access to the submissions as a matter of due process. That contention is without merit.

i. Applying the assumed qualified privilege to the facts necessitated an evaluation by the lower courts of information concerning the full scope and breadth of the ongoing grand jury investigation. Although the government took the position that it was not legally required to do so, it provided the district court with a detailed description of the progress of the investigation, including extensive references to sensitive and classified grand jury information, such as the identities of witnesses, the substance of grand jury testimony, and the strategy or direction of the investigation. As the court of appeals correctly determined, the consideration of *ex parte* submissions was uniquely appropriate in that it "ensure[d] the secrecy of ongoing grand jury proceedings," Miller Pet. App. 18a (quoting *In re Sealed Case No. 98-3077*, 151 F.3d 1059, 1075 (D.C. Cir. 1998) (per curiam)), and at the same time permitted the court to consider "a detailed showing by the government that it has satisfied the criteria for overcoming the privilege," *id.* at 101a (Tatel, J., concurring in denial of rehearing en banc). In the latter respect, as Judge Tatel

observed, "far from violating due process," consideration of *ex parte* materials "affords a critical protection to journalists." *Ibid.*

The court of appeals also correctly rejected petitioners' suggested alternative procedures, such as disclosures to their counsel. Such procedures would have provided insufficient protection for grand jury secrecy, and would have inappropriately "engage[d] the district court and the prosecutor in lengthy collateral proceedings and in so doing divert[ed] the grand jury from its investigation." See *In re Sealed Case No. 98-3077*, 151 F.3d at 1072. In any event, the mere existence of alternative procedures is insufficient to establish that petitioners' rights were not fully protected by the lower courts' careful scrutiny of detailed *ex parte* submissions, or that the court of appeals erred in ruling that the district court did not abuse its discretion in accepting *ex parte* submissions. Miller Pet. App. 18a, 66a, 101a.

ii. Contrary to petitioners' contention (Miller Pet. 28; Cooper Pet. 27-28), the lower courts' consideration of the *ex parte* materials was not barred by any decision of this Court. As Judge Tatel noted in his opinion concurring in the denial of rehearing en banc (Miller Pet. App. 102a-103a), the cases relied upon by petitioners involve situations far removed from the compulsion of grand jury testimony due to the rejection of a claim of privilege. See *In re Oliver*, 333 U.S. 257 (1948) (summary contempt proceeding arising from finding that a witness had testified evasively or falsely before judge sitting as "one-man grand jury," in which the witness had no right to the assistance of counsel, no time to prepare a defense, and no right to call witnesses or cross-examine the single witness against whose testimony the witness's testimony was being measured); *Greene* v. *McElroy*, 360 U.S. 474 (1959) (denial of ac-

cess, in challenge to revocation of contractor's security clearance, to information upon which revocation was based); *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633 (2004) (plurality opinion) (challenge to American citizen's classification and detention as an "enemy combatant" for a period of more than two and one half years without meaningful opportunity to contest detention).

Although this Court held that the litigants in each of those cases were entitled to examine and challenge the evidence against them, the disputed evidence in each case was limited and related to the litigant's own conduct. Moreover, in those cases, the potential consequences of the litigant's conduct was the central issue in the case before the Court. In this case, petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence, rather than a penalty for past actions. The evidence contained in the *ex parte* submissions related to the *government's* conduct of the grand jury investigation. As Judge Tatel commented, "[t]o avoid incarceration, [petitioners] need not persuade the district judge that any accusation against them is false; they need only abandon their unlawful resistance and testify before the grand jury." Miller Pet. App. 102a-103a (citing *International Union, UMWA* v. *Bagwell*, 512 U.S. 821, 828 (1994)). No case holds that a recalcitrant grand jury witness may not be held in contempt unless he or she first is provided with disclosure of all the other evidence gathered by the grand jury to date.

In fact, the procedure employed by the lower courts is fully consistent with, and supported by, this Court's decisions. As Judge Tatel noted (Miller Pet. App. 103a), this Court approved the use of *ex parte* proceedings to determine the reasonableness and enforceability of grand jury subpoenas in *United States* v. *R. Enter-*

prises, Inc., 498 U.S. 292 (1991). Although the witnesses could have been exposed to coercive measures upon a denial of their motion to quash, this Court observed that, "to ensure that subpoenas are not routinely challenged as a form of discovery, a district court may require that the Government reveal the subject of the investigation to the trial court *in camera*, so that the court may determine whether the motion to quash has a reasonable prospect for success before it discloses the subject matter to the challenging party." *Id.* at 302. This Court also has made clear in other contexts that recalcitrant grand jury witnesses are not entitled to extensive discovery. See, *e.g.*, *United States* v. *Dionisio*, 410 U.S. 1, 16-17 (1973) (holding grand jury witness not entitled to showing of reasonableness before being compelled to give voice exemplar, and stating "[a]ny holding would saddle a grand jury with minitrials and preliminary showings would assuredly impede its investigation and frustrate the public's interest in the fair and expeditious administration of the criminal laws"); *United States* v. *Mara*, 410 U.S. 19, 22 (1973) (no showing necessary to obtain handwriting exemplars from grand jury witness).

Moreover, as the lower courts found, the use of *ex parte* submissions was necessary to protect the secrecy of an ongoing grand jury investigation, and therefore was fully consistent with this Court's numerous decisions that emphasize that "the proper functioning of our grand jury system depends upon the secrecy of grand jury proceedings." *Douglas Oil Co.* v. *Petrol Stops Northwest*, 441 U.S. 211, 218-219 (1979). See also *United States* v. *Procter & Gamble Co.*, 356 U.S. 677 (1958). As Judge Tatel correctly noted:

> Telling one grand jury witness what another has said not only risks tainting the later testimony (not to mention enabling perjury or collusion), but may also embarrass or even endanger witnesses, as well as tarnish the reputations of suspects whom the grand jury ultimately declines to indict. Strong guarantees of secrecy are therefore critical if grand juries are to obtain the candid testimony essential to ferreting out the truth.

Miller Pet. App. 101a-102a.

iii. Petitioners are also mistaken in their contention (Miller Pet. 27-28; Cooper Pet. 28-29) that the court of appeals' decision conflicts with decisions of the Second and Ninth Circuits. As Judge Tatel correctly noted in his opinion concurring in the denial of rehearing en banc, the cases relied upon by petitioners involved situations that do not "remotely resemble[]" the situation here. Miller Pet. App. 102a. See *In re Kitchen*, 706 F.2d 1266 (2d Cir. 1983) (holding that witness whose claimed memory loss was challenged in a contempt proceeding based on the testimony of a second witness was entitled to examine and confront the testimony of the second witness); *United States* v. *Alter*, 482 F.2d 1016 (9th Cir. 1973) (ordering evidentiary hearing concerning a grand jury witness's refusal to testify based on alleged illegal surveillance and alleged inadequacy of immunity). Neither case involved a refusal to testify based on a claimed testimonial privilege,[6] and neither

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[6] Indeed, the witness in *Kitchen* did not refuse to testify at all, but rather claimed not to remember details regarding which he was questioned. As Judge Tatel noted, the situation in *Kitchen* was "more akin to punishment for perjury than evaluation of a privilege claim," and the court in *Kitchen* recognized the "need for 'heightened' procedural protection '[w]hen a case is in the grey

involved a demand for access to grand jury materials nearly as broad as the demand made by petitioners in this case.[7]

d. Even if the court of appeals had endorsed the Special Counsel's position that there is no reporter's privilege rooted in federal common law in the context of a good faith grand jury investigation, review by this Court would still be unwarranted, because, contrary to petitioners' contention (Miller Pet. 21-26; Cooper Pet. 14-16), there is no circuit conflict on that issue. No court of appeals has recognized a federal common law reporter's privilege in the grand jury context. Petitioners rely (Miller Pet. 26; Cooper Pet. 15) on *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), but the Third Circuit's decision in that case is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value, s*ee Rutledge* v. *United States*, 517 U.S. 292, 304 (1996); *Tunis Bros. Co.* v. *Ford Motor Co.*, 763 F.2d 1482, 1501 (3d Cir. 1985).[8]

2. In addition to holding that any common law reporter's privilege has been overcome on the facts of this

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area between contempt and perjury.'" Miller Pet. App. 102a (quoting *Kitchen*, 706 F.2d at 1272).

[7] Whereas the *ex parte* submission in this case covered the full breadth and scope of the grand jury's ongoing investigation, the contempt findings at issue in *Kitchen* and *Alter* turned on discrete factual determinations requiring (in *Kitchen*) the disclosure of the testimony of a single witness and (in *Alter*) the disclosure of no grand jury materials whatever.

[8] Petitioners also rely (Miller Pet. 26; Cooper Pet. 15) on a second district court decision, *New York Times* v. *Gonzales*, No. 04 Civ. 7677 (RWS), 2005 WL 427911 (S.D.N.Y. Mar. 2, 2005), but a conflict between court of appeals decisions and district court decisions is not a basis for certiorari. See Sup. Ct. R. 10.

case, the court of appeals held that there is no First Amendment reporter's privilege in the context of a good faith grand jury investigation. Petitioners also seek review of that holding. But as the court of appeals correctly recognized (Miller Pet. App. 7a-15a), this Court has already held in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), that there is no First Amendment reporter's privilege in the grand jury context. Contrary to petitioners' contention, moreover, there is no conflict among the courts of appeals on that question. And this would not be an appropriate case to reconsider the issue, because any First Amendment privilege would be no broader than the common law privilege whose existence the court of appeals assumed, and it would thus be overcome on the facts of this case for the same reasons the common law privilege was overcome.

a. In *Branzburg*, the Court held that journalists, like other citizens, must "respond to relevant questions put to them in the course of a valid grand jury investigation." 408 U.S. at 690-691; see *Cohen* v. *Cowles Media Co.*, 501 U.S. 663, 669 (1991) (citing *Branzburg* for the proposition that "the First Amendment [does not] relieve a newspaper reporter of the obligation shared by all citizens to respond to a grand jury subpoena and answer questions relevant to a criminal investigation, even though the reporter might be required to reveal a confidential source"); *University of Pa.* v. *EEOC*, 493 U.S. 182, 201 (1990) (*Branzburg* "rejected the notion that under the First Amendment a reporter could not be required to appear or to testify as to information obtained in confidence without a special showing that the reporter's testimony was necessary"). The Court rejected the suggestion that courts should conduct a case-by-case balancing of interests each time a reporter is subpoenaed by a grand jury. Instead the Court struck

a one-time balance: the state's interest in "law enforcement and in ensuring effective grand juries" justifies the "burden on First Amendment rights" when "reporters [are required] to give testimony in the manner and for the reasons that other citizens are called." *Branzburg*, 408 U.S. at 690, 700. The Court refused to grant news sources a privilege not granted to law enforcement informants in criminal cases. *Id.* at 698.

In striking this balance, the Court carefully analyzed the competing interests. The reporters claimed that newsgathering would be significantly impeded, 408 U.S. at 680, but the Court concluded that requiring testimony from reporters in cases where news sources are "implicated in crime or possess information relevant to the grand jury's task" would not seriously impede newsgathering, *id.* at 691. The Court observed that many news sources have a "symbiotic" relationship with the press "which is unlikely to be inhibited by the threat of subpoena." *Id.* at 694. Noting that predictions of a constricted flow of news were to "a great extent speculative" and that such predictions often are made by persons with "professional self-interest," the Court stated that "the evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen." *Id.* at 693. The Court concluded that "the lesson history teaches us" is that "the press has flourished" without special privileges. *Id.* at 698, 699.

The Court also weighed the claimed adverse effect on newsgathering against the public interest in law enforcement. The Court concluded that, even if some news sources were deterred, it could not "accept the argument that the public interest in possible news

about crime from undisclosed and unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future." 408 U.S. at 695. The Court also stated that case-by-case balancing of interests would embroil the courts in "preliminary factual and legal determinations" that would "present practical and conceptual difficulties of a high order." *Id.* at 704, 705.

At the end of its opinion in *Branzburg*, the Court noted that "news gathering is not without its First Amendment protections." 408 U.S. at 707. The Court stated that, in cases where grand jury investigations are being conducted in bad faith, without legitimate law enforcement purposes, or to harass the press or disrupt relationships with news sources, a court would be authorized to grant a motion to quash on First Amendment grounds. *Ibid.*[9]

Justice Powell, who joined the Court's opinion, wrote a brief concurring opinion underscoring the point made by the Court in the concluding portion of its opinion. 408 U.S. at 701-710. The best reading of Justice Powell's concurring opinion, and the only reading that reconciles his opinion with the fact that he joined the opinion of the Court, is that he was elaborating on the role of courts in cases of bad faith investigations. Justice Powell's references to a "claim to privilege" and "case-by-case" balancing should thus be read as limited

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[9] That the Court grounded its admonition against harassment in the First Amendment is not surprising inasmuch as *Branzburg* involved several consolidated state cases. Only the Constitution could provide the basis for this Court to require the states to recognize a basis for a motion to quash.

to cases of alleged harassment. *Id.* at 710. Justice Powell's later opinions are fully consistent with this interpretation of his concurring opinion in *Branzburg*. See *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring); *Saxbe* v. *Washington Post*, 417 U.S. 843, 859 (1974) (Powell, J., dissenting). There is nothing to suggest that Justice Powell intended to transform the clear language of the Court's opinion, and, as the court of appeals observed, "whatever Justice Powell specifically intended, he joined the majority." Miller Pet. App. 14a.[10]

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[10] Petitioners suggest (Miller Pet. 9; Cooper Pet. 25-26) that the number of subpoenas to reporters has increased, with potential negative effects on newsgathering. Petitioners offer the selfsame arguments and evidence that were advanced in *Branzburg*, including claims of an unprecedented assault on the press (408 U.S. at 699) and affidavits from members of the press predicting the drying up of sources and seriously diminished news gathering (*id.* at 693, 694). Events since 1972 continue to teach the same lesson that history taught the Court in *Branzburg*—namely, that the lack of a federal reporter's privilege in the grand jury context has not had the negative effects that were predicted. Petitioners' claim of adverse effects on news gathering amounts to an argument that proves too much: "If newsmen's confidential sources are as sensitive as they are claimed to be," as *Branzburg* observed, "it would appear that only an absolute privilege would suffice." *Id.* at 702. In fact, confidential sources may be disclosed in a variety of ways, including by the reporters themselves. See, *e.g.*, Stephen Bates, *The Reporter's Privilege, Then and Now* 11 (Research Paper R-23) (Apr. 2000), *available at* http://www.ksg.harvard.edu/presspol/Research_Publications/Papers/Research_Papers/R23.pdf; Kathryn M. Kase, Note, *When a Promise is Not a Promise: The Legal Consequences for Journalists Who Break Promises of Confidentiality to Sources*, 12 Hastings Comm. & Ent. L.J. 565, 576-577 (1990); Monica Langley & Lee Levine, *Broken Promises*, Col. Journalism Rev., July-Aug. 1998, at 21. Indeed, as a result of self-regulation by the Department of Justice, through its guidelines for the issuance of media subpoenas (a factor considered by the Court

b. Petitioners contend (Miller Pet. 11-20; Cooper Pet. 21-23) that there is a conflict in the circuits regarding the existence of a reporter's privilege grounded in the First Amendment. But no court of appeals has recognized a First Amendment reporter's privilege in the circumstances of a grand jury investigation conducted in good faith. To the contrary, every federal court of appeals to address the issue, consistent with the court of appeals' decision in this case, and consistent with *Branzburg*, has refused to recognize a First Amendment reporter's privilege in that context. See *In re Grand Jury Proceedings*, 5 F.3d 397, 403 (9th Cir. 1993), cert. denied, 510 U.S. 1041 (1994); *In re Grand Jury Proceedings, Storer Communications*, 810 F.2d 580, 584-585 (6th Cir. 1987). See also *In re Special Proceedings*, 373 F.3d 37, 44, 45 (1st Cir. 2004) (holding that *Branzburg* precludes recognition of a First Amendment reporter's privilege in connection with special prosecutor's investigation, a context the court found analogous to a grand jury investigation). As noted above, the Third Circuit decision upon which petitioners rely (Miller Pet. 14; Cooper Pet. 21), *In re Williams*, 766 F. Supp. 358 (W.D. Pa. 1991), aff'd by an equally divided court, 963 F.2d 567 (3d Cir. 1992), is an affirmance, without opinion, by an equally divided en banc court, and thus lacks precedential value.

In applying a reporter's privilege in contexts *other* than a grand jury investigation, the courts of appeals have distinguished *Branzburg*, and expressly acknowledged that *Branzburg* precludes recognition of a First Amendment privilege in the context of a good faith

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in *Branzburg*, 408 U.S. at 706-707), the subpoenas attributable to federal grand jury investigations and prosecutions represent a small minority of the subpoenas identified in the petitions.

grand jury investigation. *See, e.g., Zerilli*, 656 F.2d at 711 (distinguishing *Branzburg* on the ground that the Supreme Court "justified the decision by pointing to the traditional importance of grand juries and the strong public interest in effective criminal investigation"); *Baker* v. *F&F Investment*, 470 F.2d 778, 784-785 (2d Cir. 1972) ("the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the [civil] case before us"); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 9 (2d Cir.) ("we are dealing here with a civil action rather than questioning by a grand jury"), cert. denied, 459 U.S. 909 (1982). As these decisions correctly recognize, this Court's decision in *Branzburg* turned on the unique and vital role of the grand jury in our criminal justice system. As the Court observed in *Branzburg*:

> The prevailing constitutional view of the newsman's privilege is very much rooted in the ancient role of the grand jury that has the dual function of determining if there is probable cause to believe that a crime has been committed and of protecting citizens against unfounded criminal prosecutions.

408 U.S. at 686-687 (footnote omitted). The Court's holding clearly articulated the importance of the grand jury's role, and the paramount public interest in law enforcement:

> We are asked to create another [testimonial privilege for unofficial witnesses] by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy. This we decline to do. Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function

> of government and the grand jury plays an important, constitutionally mandated role in this process.

Id. at 690 (footnote omitted). By distinguishing the grand jury from other legal contexts, the courts of appeals have consistently, and correctly, followed *Branzburg*'s teaching.

c. Cooper and Time argue that, "even if the D.C. Circuit's reading of *Branzburg* were correct, the change in First Amendment law since that time makes this case uniquely appropriate for this Court's review." Cooper Pet. 24 (citing *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622 (1994), and *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001)). But neither of the decisions cited in the petition addressed the balancing of First Amendment interests against interests related to the historically unique role of grand juries in the investigation of crimes. In any event, this case would not be a suitable vehicle for reconsidering *Branzburg* even if the Court were inclined to do so, because a First Amendment privilege would be no broader than the common law privilege assumed to exist by the court of appeals, and thus would be overcome in this case for the same reasons the assumed common law privilege was overcome.[11]

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[11] Petitioners also rely (Miller Pet. 19-20 & n.19; Cooper Pet. 21-22 & n.6) on decisions of state courts. All but two, however, involve application of a First Amendment reporter's privilege in contexts other than the grand jury, and only one of those two was decided after *Branzburg*. That case, *In re Letellier*, 578 A.2d 722 (Me. 1990), was wrongly decided. It misconstrued *Branzburg* and relied upon prior decisions of the First Circuit applying a reporter's privilege in civil proceedings. *Id.* at 724-726. This would not be an appropriate case for resolving any conflict between the lone state decision cited by petitioners and the decisions of the federal courts

3. The Special Counsel seeks to bring the ongoing investigation, which he began in December 2003, to as swift a conclusion as possible. By fall 2004, the Special Counsel's investigation was for all practical purposes complete except for the testimony of Miller and Cooper. The unsuccessful negotiations with petitioners and the litigation on the motions to quash and the contempt citations has proceeded in the months since then. The Special Counsel has endeavored to expedite the proceedings to the extent possible. After rehearing was denied in the court of appeals, the Special Counsel agreed to stay the mandate upon the agreement of petitioners to a schedule that would allow the filing of the certiorari petitions, the briefs of *amici*, the brief in opposition, and petitioners' reply briefs in time for this Court to consider the petitions before its summer recess. The Special Counsel respectfully requests that the Court deny the petitions at its earliest possible opportunity, so that the investigation can be brought to a close.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2005

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of appeals, however, because any First Amendment privilege would be overcome in this case.

(6)

No. 04-1507

Supreme Court, U.S.
FILED
JUN 6 - 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

JUDITH MILLER,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

There is a manufactured simplicity to the Special Counsel's brief in opposition to the petition for a writ of certiorari, one obviously driven by an effort to diminish both the importance of the issues presented by this case and the numerous, irreconcilable conflicts among the lower courts as to how those issues should be resolved. Indeed, the Special Counsel's brief offers a new demonstration of the truth of the ancient boxing adage that "you can run but not hide." Try as he does to avoid the reality that the lower federal courts (and state courts) have struggled unsuccessfully and utterly inconsistently to reconcile this Court's opinion in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), with Justice Powell's concurring opinion there; try as he does to ignore this Court's ruling in *Jaffee* v. *Redmond*, 518 U.S. 1 (1996), the Congressional mandate embodied in Rule 501 and the national consensus that a reporter's privilege should be recognized; and try as he might to belittle petitioner's rights under the Fifth Amendment, the Special Counsel's repeated efforts to avoid the issues raised by this case only reveals more clearly why the petition should be granted.

As the Special Counsel would have it, the Court should not grant the petition because 1) even assuming that a reporter's privilege exists under federal common law—whatever it may be—he has made whatever showing might be required of him to defeat it; 2) there is no conflict among the lower courts—as he redefines the issue—that would warrant this Court's intervention, and; 3) the Due Process clause has nothing to say about the fact that petitioner now faces 18 months of imprisonment on the basis of secret evidence that neither she nor her counsel has been permitted to see or rebut. Almost as an afterthought, the Special Counsel adds that this Court's ruling in *Branzburg* is dispositive of the First Amendment issues that permeate the petition. *See* Opp. Br. at 22. The Court's ruling in *Jaffee* is relegated to a footnote which offers not a word of argument as to whether, in fact, the decision of the court of appeals is consis-

tent with *Jaffee*. *Id.* at 13-14 n.5. When questions of undeniable national import arising out of multiple and directly conflicting rulings of courts of appeals are presented to this Court, they may not be avoided by simply relegating them to the back of a brief in opposition or to a footnote.

ARGUMENT

1. If there is one theme that emerges from the petition in this case, the petition in 04-1508 and the four briefs, *amici curiae*, urging this Court to grant certiorari, it is that these cases present issues of fundamental national importance that are bound to recur with ever greater frequency. The Special Counsel does not dispute this. In fact, he says nothing about it at all. He has no answer to the body of important news reports that could only have been published with information provided by confidential sources.[1] He has no answer to the unrebutted testimony that the public will be deprived of critical information concerning the very functioning of our government if journalists can no longer assure sources that their identities will not be revealed. The Special Counsel has no answers to these matters because there are none.

2. If there is another theme that emerges from the submissions of the petitioners and the four briefs *amici curiae* it is that the state of the law today is in serious disarray in an area where predictability of result is essential. The Special Counsel disagrees, choosing instead simply to redefine the issue so as to permit him to urge that there is actually no conflict among the lower courts at all. According to the Special Counsel, the only

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[1] Recent events cannot help but bring to mind the Watergate revelations and the Enron scandal. Indeed, in its decision of last Tuesday, this Court noted that the Enron investigation was prompted by a report in the Wall Street Journal suggesting improprieties at the company. *See Arthur Andersen LLP* v. *United States*, No. 04-368, slip op. at 2 (U.S. May 31, 2005). The Journal's report was based on information provided by confidential sources. *See Brief, Amici Curiae, of ABC, Inc., et al.* at 11-12. These examples, and the many others cited by the *amici*, only serve to confirm that the use of confidential sources is routine and generally accepted to be a beneficial part of our lives.

issue to focus on is whether there is disagreement among the lower courts that a journalist's privilege should be recognized in the specific context of grand jury proceedings. Having thus framed the issue, the Special Counsel insists that there is no such conflict and proceeds along his way. His framing of the issue is analytically indefensible but, even as he has so framed it, he is incorrect in asserting that there is no debate among the lower courts about it.

The Special Counsel concedes—in a footnote tucked in the back of his brief in opposition—that there is a direct and irreconcilable conflict between the decision below and a decision of a state court of last resort even if the issue to be focused on is as the Special Counsel has defined it. *See* Opp. Br. at 28, n.11 (acknowledging that *In re Letellier*, 578 A.2d 722 (Me. 1990), concluded that the journalist's privilege exists in the grand jury context). Having conceded the conflict, the Special Counsel is left to argue that *Letellier* was "wrongly decided," an argument that is irrelevant at the certiorari stage.

To support his argument that there is no conflict among the lower federal courts, the Special Counsel glosses over or ignores decisions in three circuits that have recognized a reporter's privilege in the context of grand jury proceedings. *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004) (recognizing the need for " 'heightened sensitivity' " to First Amendment interests and a " 'balancing of considerations' " when reporters are called upon to reveal confidential sources); *United States* v. *Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (recognizing "the need to balance First Amendment values even where a reporter is asked to testify before a grand jury") (citing *Baker* v. *F & F Investment*, 470 F.2d 778, 784-85 (2d Cir. 1972); *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (*en banc*) (affirming, by an equally divided court, the district court's decision to quash grand jury subpoenas issued to reporters).

Remarkably, the Special Counsel also chooses to ignore decisions of the First, Second, Third and Eleventh Circuits that have recognized the privilege in the context of criminal trials. *See United States* v. *LaRouche Campaign*, 841 F.2d 1176, 1181 (1st

Cir. 1988); *Burke*, 700 F.2d at 77; *United States* v. *Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980); *United States* v. *Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (applying *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980). In ignoring the decisions of these four appellate courts, the Special Counsel implies that there is an analytically sound distinction to be drawn between criminal trials and grand jury proceedings that would permit recognition of the reporter's privilege in one context but not the other. But, as Judge Tatel correctly observed, the question of whether a privilege *exists* cannot turn on the nature of the proceeding in which it may be asserted. App. 55a. The law does not recognize one attorney-client privilege for criminal trials and another (or none at all) for grand jury proceedings. While the application of a privilege may vary depending on the context of the case, the question of whether there *is* a privilege cannot depend on the caption of the case. The Second Circuit recognized this point in *Gonzales* v. *National Broadcasting Co.*, 194 F.3d 29 (2d Cir. 1999), when it observed that while competing First Amendment interests in criminal cases should be given less weight than in civil cases, the privilege nevertheless still exists. *Id.* at 34 n.3 (citing *Burke*, 700 F.2d at 77). Based on that same logic, the Third Circuit in *Cuthbertson* recognized that "the interests of the press that form the foundation of the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial" as opposed to a civil case. 630 F.2d at 147. Just as the privilege should not depend on whether a case is civil or criminal, there is no legally principled reason for its existence to hinge on whether a criminal proceeding is in its investigatory or trial stage. *See New York Times Co.* v. *Gonzales*, No. 04 Civ 7677 (RWS), 2005 WL 427911, at *30, *32 (S.D.N.Y. Mar. 2, 2005) (collecting authorities recognizing reporter's privilege in "all phases of a criminal prosecution" and observing that the "scope of the reporter's privilege may vary depending on the context, but whether there is a qualified privilege rooted in the First Amendment is not dependent on the nature of the case."); Fed. R. Evid. Rule 1101(c). Not surprisingly therefore, the Special Counsel does not even begin

to explain why he, in the course of guiding a grand jury, should be immune from the commands of the First Amendment or federal common law that would apply to a defendant in a federal criminal case who is guaranteed the protections of the Bill of Rights.[2]

3. Having conceded, by his silence, that the issues presented by the petition are of substantial importance and having unsuccessfully attempted to diminish the cacophony of differing views among the lower courts, the Special Counsel turns to his principal argument in opposition to the petition. According to the Special Counsel, all three members of the panel below assumed that there was a privilege under federal common law, assumed that its contours were correctly articulated in Judge Tatel's opinion and nevertheless concluded that the Special Counsel had made a showing sufficient to defeat it. As such, he urges, Ms. Miller cannot possibly prevail in this case and therefore the Court should not hear it.

At the outset, the fact that the Special Counsel expresses confidence that the Court may ultimately rule against the petitioner after it articulates a standard heretofore unarticulated by this Court, is hardly a persuasive ground for urging that the petition should be denied. In any event, any suggestion that the panel below agreed as to the scope of the privilege is demonstrably incorrect. Judge Henderson specifically rejected the test proffered by Judge Tatel insisting that it "lack[ed] analytical rigor,"

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[2] The Ninth Circuit and now the D.C. Circuit have recognized a privilege for reporters subpoenaed in criminal cases but not those subpoenaed by a grand jury. *Compare Farr* v. *Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975), *with In re Grand Jury Proceedings* (*Scarce* v. *United States*), 5 F.3d 397, 400 (9th Cir. 1993), and *United States* v. *Ahn*, 231 F.3d 26 (D.C. Cir. 2000), *with* App. 1a-77a. Like the Special Counsel, neither court even attempted to provide any rationale for such a distinction except to observe that *Branzburg* arose in the grand jury context. *See* 5 F.3d at 402; App. 41a-42a. Ultimately, the criminal trial/ grand jury distinction is not only unpersuasive but is irreconcilable with *Branzburg* itself, which used the phrases "criminal trial" and "grand jury" interchangeably. *See* 408 U.S. at 690-91.

(App. 36a) and required a balancing that "may prove unproductive." *Id.* at 37a. "Moreover," Judge Henderson wrote, "to attempt to establish the contours of a reporter's privilege here would tend, unnecessarily, to leave a future panel less maneuverability in a case that might require just that to achieve justice." *Id.* at 38a. For his part, Judge Sentelle rejected the concept of a reporter's privilege outright going only so far as to say that he did not "disagree" that the Special Counsel had submitted sufficient proof to defeat any privilege that might obtain. *Id.* at 22a.

This is not mere word mincing. It is of little comfort to Ms. Miller, the 42 news organizations and reporters' groups who submitted briefs, *amici curiae*, to this Court and to the many other reporters who cover sensitive issues of national importance on a daily basis that a future panel of the court of appeals is left with the "maneuverability" to decide whether and to what extent a journalist has any right not to reveal her confidential sources when the government demands that she do so. Nor is it any answer to the 34 states and the District of Columbia who have joined in the extraordinary brief, *amici curiae*, seeking this Court's guidance on an issue that, they persuasively demonstrate, has seriously undermined the application of their own state laws.[3]

As this Court has made clear, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." *Upjohn Co.* v. *United States*, 449 U.S. 383, 393 (1981); *Jaffee*, 518 U.S. at 18 ("[I]f the purpose of the privilege is to be served,

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[3] One reason the brief, *amici curiae*, is of such significance is because it is so counter-intuitive. Submitted by a clear majority of state attorneys-general, the very entities that may be thought to be deprived of the evidence that state privileges protect, the brief nonetheless urges that since 49 states have recognized such a journalist's privilege and since the absence of federal protection "undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them," "some form of a reporter's privilege grounded in federal common law is appropriate" and should be embodied in law by this Court. *See Brief, Amici Curiae, of the States of Oklahoma, et al.* at 3, 6.

the participants in the confidential conversation 'must be able to predict with some degree of certainty whether particular discussions will be protected.' ") (citing *Upjohn*, 449 U.S. at 393). In upholding the reporter's privilege, courts of appeals have also stressed the importance—for both journalists and their sources—of having a predictable rule of law. *See, e.g., Zerilli* v. *Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Baker*, 470 F.2d at 782-83.

4. The Special Counsel seeks to justify his confidence in his case by repeated reliance on the conclusions—whatever they may be—set forth in the eight secret pages of Judge Tatel's concurring opinion, which we are told provide the basis upon which even a valid claim of privilege by Ms. Miller is to be rejected and her incarceration for up to 18 months sustained. The Special Counsel does not take issue with the notion that jailing someone based upon judicial findings never shown to her and to which she has no opportunity to respond is unprecedented in our history. Nonetheless, since any privilege for journalists to protect the identity of their confidential sources is supposedly overcome "on the facts of the case" by an *ex parte*, *in camera* submission made by the Special Counsel to the district court, not a word of which has been made available in any fashion even to Ms. Miller's counsel, the Special Counsel maintains that it is of no moment whether any privilege exists at all.

This simply misses the point. For one thing, in a situation in which the scope of any journalist's privilege has yet to be defined by this Court, it can hardly be said that *whatever* showing the Special Counsel has proffered meets the as-yet-unspecified test. If, for example, this Court were to follow its reasoning in *Jaffee* in this case, it would be led to establish a privilege, the "full contours" of which would be fleshed out over time but which would not involve a constant *ad hoc* "balancing component" which could, by its nature, "eviscerate the effectiveness of the privilege" 518 U.S. at 18, 17.[4] A number of the 34 states

[4] The Special Counsel's repeated apparently pejorative use of the word "absolute" to characterize such a privilege is a misnomer, just as it

that joined the brief, *amici curiae*, urging the Court to grant the writ in this case, provide just such protection.[5]

5. Even if any First Amendment or federal common law-rooted protection articulated by this Court involved some sort of *ad hoc* balancing of the sort rejected in *Jaffee*, the position of the Special Counsel that there is no due process right of Ms. Miller to see (or for her counsel to see) and respond to the submission made by the Special Counsel that persuaded the court of appeals that any privilege should be deemed overcome cannot be deemed consistent with core due process principles.[6] The

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would be with respect to the privileges afforded to psychotherapists or, say, lawyers. While *Jaffee* does not specify what limits there may be on the former common law privilege, there is no reason to believe that psychotherapists will be held privileged not to reveal information about future crimes of their patients of which they are advised. *Jaffee*, 518 U.S. at 18 n.19 ("[W]e do not doubt that there are situations in which the privilege must give way, for example, if a serious threat of harm to the patient or to others can be averted only by means of a disclosure by the therapist"); *United States* v. *Glass*, 133 F.3d 1356, 1360 (10th Cir. 1998) (observing that a psychotherapist may testify about a threat made by a patient if "the threat was serious when it was uttered and . . . its disclosure was the only means of averting harm . . . when the disclosure was made"). As for lawyers, there is no attorney client protection when the crime fraud exception is deemed applicable. *See, e.g., United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975) ("[A]t common law, it is settled that confidential communications from client to attorney are not privileged if the court concludes the evidence warrants a finding that the communications were made for the purpose of obtaining aid in the commission of future criminal acts."). Similar exceptions may yet be articulated for journalists.

[5] Fourteen states, the District of Columbia and one territory have recognized a *Jaffee*-like privilege for journalists to protect confidential sources in an adjudicative setting. They are Alabama, Arizona, California, Delaware, the District of Columbia, Guam, Indiana, Kentucky, Maryland, Montana, Nebraska, Nevada, New York, Ohio, Oregon and Pennsylvania. *See* Petition at 23 n.21.

[6] In light of the Special Counsel's thus far successful efforts to prevent petitioner and her counsel from seeing the materials he filed with the district court (or even summaries of them), it is ironic, at best, for him

conclusion of this Court in *Hamdi* v. *Rumsfeld*, 124 S. Ct. 2633, 2651 (2004), is telling: if "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short" for enemy combatants, it is not too much to ask at least the same for American journalists. It is no answer for the Special Counsel to treat Ms. Miller as if she had served some sort of punishing FOIA request or a demand for "extensive discovery." Opp. Br. at 19. She seeks no such thing, only the opportunity for her counsel to review the materials the Special Counsel furnished to the district court in an effort to persuade it to hold Ms. Miller in contempt.[7] Nor can the Special Counsel distinguish *Hamdi*, other cases of this Court, and contrary rulings of the Second and Ninth Circuits by asserting that in all such cases "the potential consequences of the litigant's conduct was the central issue in the case," while here "petitioners faced a coercive penalty of civil contempt because they refused to obey a lawful order to give evidence . . . ." Opp. Br. at 18. Here, of course, the very question before the Court is whether the order directed at the petitioners was or was not "lawful." To deprive petitioners of any meaningful opportunity to argue that the order was not lawful by depriving their lawyers of the opportunity even to be apprised of what documents the Special Counsel has filed with the district court to demonstrate the order's legality is at least as

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to argue that petitioner should be faulted for not urging that "the court of appeals relied on erroneous factual findings or misapplied the assumed privilege to the facts of this case." Opp. Br. at 15-16. There are no factual findings that petitioner or her attorneys have been permitted to see.

[7] For the same reason, the Special Counsel's reliance on *United States* v. *R. Enterprises, Inc.*, 498 U.S. 292 (1991), is misplaced. No contempt proceedings were involved there. Equally as important, the Court did not consider a First Amendment-based challenge to the subpoenas at issue in *R. Enterprises*; indeed it suggested that if First Amendment interests were implicated, a different analysis might obtain. *See id.* at 303; *id.* at 306-07 (Stevens, J., concurring). *See also In re Grand Jury Subpoena*, 955 F.2d 229, 233-34 (4th Cir. 1992) (on remand).

violative of the Due Process Clause as was the case in *Hamdi* and all other cases cited.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

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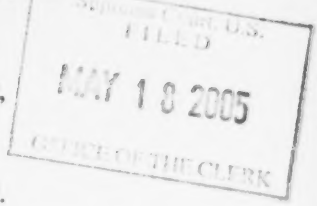
[8] This principle is reflected in the Classified Information Protection Act ("CIPA") itself, which establishes procedures for the use of classified information in criminal trials. 18 U.S.C. app. §§ 1–16. (1982). Under CIPA, if classified information is relevant, admissible and " 'helpful' " to a defendant's case or is " 'essential to a fair determination of a cause,' " courts will require the government, at a minimum, to provide a summary of the classified information or a statement admitting facts that the information would tend to prove. *United States* v. *Moussaoui*, 365 F.3d 292, 308 (4th Cir. 2004) (citation omitted), *cert. denied*, 125 S. Ct. 1670 (2005); 18 U.S.C. app. §§ 6(c)(1)(A) and (B). If those methods do not provide the defendant with "substantially the same ability to make his defense as would disclosure of the specified classified information," courts are authorized under CIPA to dismiss the defendant's indictment. *Id.* at §§ 6(c)(1) and 6(e)(2); *see also United States* v. *Fernandez*, 913 F.2d 148, 154 (4th Cir. 1990) ("Although CIPA contemplates that the use of classified information be streamlined, courts must not be remiss in protecting a defendant's right to a full and meaningful presentation of his claim to innocence.").

(2) (2)

Nos. 04-1507 & 04-1508

IN THE

Supreme Court of the United States



JUDITH MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF ABC, INC., ADVANCE PUBLICATIONS, INC., THE ASSOCIATED PRESS, THE ASSOCIATION OF AMERICAN PUBLISHERS, INC., CABLE NEWS NETWORK LP, LLLP, CBS BROADCASTING INC., DOW JONES & COMPANY, INC., DR PARTNERS D/B/A STEPHENS MEDIA GROUP, GANNETT CO., INC., GRAY TELEVISION, INC., GRUNER + JAHR USA PUBLISHING, THE HEARST CORPORATION, LANDMARK COMMUNICATIONS, INC., MAGAZINE PUBLISHERS OF AMERICA, MEDIA GENERAL, INC., THE NATIONAL NEWSPAPER ASSOCIATION, NATIONAL PUBLIC RADIO, INC., NBC UNIVERSAL, NEWSWEEK, INC., RANDOM HOUSE, INC., REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, SOCIETY OF PROFESSIONAL JOURNALISTS, TRIBUNE COMPANY AND THE WASHINGTON POST IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*

Amici are publishers, broadcasters, cable networks and organizations of journalists and publishers.[1] In the last two years at least a dozen journalists employed by many of these *amici* have been held in contempt or placed at risk of contempt simply for honoring what they understand to be their professional ethical obligations to their sources. The penalties imposed in recent months on the Petitioners and other journalists dwarf any others in American history. Absent clarification of the applicable law by this Court, the decision below threatens to make compelled disclosure of journalists' confidential sources the norm rather than the rare exception. For this reason alone, the Court should grant *certiorari* and address directly the extent to which the First Amendment and federal common law preclude the compelled disclosure from journalists of the identities of those who seek to disseminate information to the public anonymously.

SUMMARY OF ARGUMENT

1. These cases deserve the attention of this Court because reporters across the country currently face a wave of federal subpoenas demanding the disclosure of their confidential sources and these subpoenas are being enforced through punitive measures of unparalleled severity. The press regularly depends on sources who will speak only on the condition of anonymity. The uncertainty fueled by the decision below renders it much more difficult for any

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[1] A complete list of the *amici* is set out in Appendix A ("App.") to this brief. Citations to the Appendix in the court of appeals are designated "A." Pursuant to S. Ct. R. 37.6, the *amici* state that no counsel for a party to this action authored any portion of this brief *amici curiae* and that no person or entity, other than the *amici*, made a monetary contribution to the preparation or submission of this brief. Written consent of all parties to the filing of this brief has been filed with the Clerk of the Court pursuant to S. Ct. R. 37.2(a).

reporter to make a credible pledge of confidentiality and threatens to restrict the flow of important information to the public. This Court's intervention is urgently needed to clarify the extent to which reporters can make a promise of confidentiality that will be respected by the federal judiciary, as it routinely is in state courts.

2. The court of appeals' refusal in this case to recognize *any* First Amendment protection for a reporter's commitment to an anonymous source once a grand jury is convened cannot be squared with this Court's jurisprudence affording First Amendment protection to anonymous speech. As the Court has recognized, the First Amendment properly limits government's ability to coerce the disclosure of the identity of anonymous speakers because, without some constitutional protection, a significant amount of protected speech will inevitably be lost to the public. The decision below construes this Court's holding in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in a manner that conflicts with the Court's decisions affording constitutional protection to anonymous speech, decisions that are expressly based on the historic role the press has played in safeguarding the anonymous speaker. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

ARGUMENT

I. THE DECISION BELOW RAISES AN ISSUE OF CENTRAL IMPORTANCE TO THE OPERATION OF A FREE PRESS

A. The Number of Federal Subpoenas Demanding Disclosure of Reporters' Sources Has Reached Unprecedented Levels

For more than twenty-five years following this Court's decision in *Branzburg*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources

were rare. *Amici* are not aware of any journalist who was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed dramatically. An unusually large number of subpoenas seeking the names of anonymous sources has been issued by federal courts in a remarkably short period of time, many to these *amici* and the journalists they employ. Indeed, just three matters in Washington, D.C. have recently generated subpoenas to roughly two dozen reporters and news organizations seeking confidential sources, seven of whom have already been held in contempt in less than a year. [2]

The decision below reflects this new willingness by some federal courts to enforce such subpoenas and impose severe sanctions against journalists. In fact, *amici* are aware of only two decisions from 1976-2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and both quashed the subpoenas. *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (en banc); *In re Grand Jury Subpoenas*, 8 Media L. Rep. 1418 (D. Colo. 1982).

Yet since 2000, three federal courts of appeals have affirmed contempt citations issued to reporters who declined to reveal confidential sources, each time imposing prison sentences more severe than any previously known to have been experienced by journalists in American history.[3] In

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[2] By way of comparison, the last significant survey of news organizations conducted in 2001 by *amicus* Reporters Committee for Freedom of the Press revealed only two subpoenas seeking confidential source identities issued from any judicial or administrative body that year, federal or state. *See* www.rcfp.org/agents/material.html (last visited May 13, 2005).

[3] On those relatively rare occasions in the past when courts did hold reporters in contempt for declining to reveal sources, penalties were

2001, free-lance writer Vanessa Leggett served nearly six months in prison for declining to reveal sources of information related to a notorious murder, almost four times longer than any prison term previously imposed on any reporter by any federal court. *In re Grand Jury Subpoenas*, 29 Media L. Rep. 2301 (5th Cir. 2001) (per curiam). Earlier this year, James Taricani, a reporter for WJAR-TV in Rhode Island, completed a four-month sentence of home confinement for declining to reveal who leaked a videotape capturing alleged corruption by public officials in Providence. *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004). And the decision below ordering two reporters to prison for up to eighteen months, if allowed to stand, would result in the most severe contempt penalty ever imposed by an American court on a journalist for refusing to disclose a confidential source.

Decisions such as these have encouraged private litigants and the federal courts adjudicating their cases to demand confidential source information from reporters in similarly unprecedented fashion. In one pending civil suit, five reporters employed by *The New York Times*, *Los Angeles Times*, *Associated Press* and *CNN* have been held in contempt and subjected to fines of $500 per day each for declining to reveal their confidential sources of information about Dr. Wen Ho Lee, who claims such information was provided to them by government agents in violation of the

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largely symbolic. One commentator surveying early cases noted "a certain judicial reluctance to hold the newsman in contempt where this eventuality can conveniently be avoided." Note, *The Right of a Newsman to Refrain from Divulging the Sources of His Information*, 36 VA. L. REV. 61, 74 (1950). The longest sentence previously known to have been served by a reporter for refusing to reveal a source was 46 days in a case arising shortly after *Branzburg*. *See Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); www.rcfp.org/jail.html (*Los Angeles Herald-Examiner* reporter William Farr).

Privacy Act. *See Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26 (D.D.C. 2004); *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15 (D.D.C. 2003). Contempt proceedings are currently pending against a sixth reporter in the same case. The six reporters include three Pulitzer Prize winners. The district court in the *Lee* case has expressly left open the possibility of additional, more severe sanctions if its contempt orders are affirmed on appeal. *See Lee*, 327 F. Supp. 2d at 33. And, in the wake of the success of Dr. Lee and the Respondent in this case, the plaintiff in another civil suit alleging violations of the Privacy Act, Dr. Steven Hatfill, issued subpoenas to a dozen news organizations seeking to compel an even larger number of reporters to disclose the identities of their confidential sources.[4]

Today, reporters and their potential sources operate in a far more uncertain and risky environment as a result of the approach to the reporters' privilege taken by the federal courts in all of these cases, most especially in the decision below. *Amici* journalists and news organizations currently face a realistic prospect of substantial prison terms and escalating fines for honoring promises to sources that in the past could confidently be made without fear of sanction.

B. Confidential Sources Are Often Essential to Informing the Public About Matters of Vital Concern

At bottom, the decision below warrants review because the uncertainty it has engendered threatens to jeopardize the flow of information to the public. The press "serves and was designed to serve [by the Founding Fathers] as a powerful

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[4] *Special Report: Reporters and Federal Subpoenas*, Reporters Comm. for Freedom of the Press, www.rcfp.org/shields_and_subpoenas.html (last visited May 13, 2005).

antidote to any abuses of power by governmental officials." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). The press cannot effectively perform this constitutionally recognized role without the ability to maintain the confidentiality of those sources who will speak only on a promise of anonymity. Unless this Court acts, the public's ability to receive information about its government through the press will be substantially impaired.

There can be no genuine dispute that journalists regularly depend on anonymous sources to report stories about the operation of government and other matters of public concern. One recent examination of roughly 10,000 news media reports concluded that fully thirteen percent of front-page newspaper articles relied at least in part on anonymous sources.[5] While there is healthy debate within the journalism profession about the appropriate uses of anonymous sources, all sides of that debate agree that confidential sources are at times essential to effective news reporting.[6]

In recent proceedings in the federal courts, journalist after journalist has convincingly testified about the important role confidential sources play in enabling them to report about matters of manifest public concern.[7] As WJAR reporter James Taricani testified before being sentenced to house arrest:

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[5] *See generally State of the News Media 2005*, www.stateofthemedia.org /2005/index.asp (last visited May 13, 2005).

[6] *See generally Reporters and Confidential News Sources Survey 2004*, www.firstamendmentcenter.org/news.aspx?id=14922 (last visited May 13, 2005).

[7] Attached to this brief as Appendix B is a compendium of affidavits recently submitted to federal courts by journalists employed by these *amici* documenting the indispensable role played by confidential sources in their reporting about public matters.

> In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court.

App. at B40 ¶5. Indeed, Mr. Taricani described a host of important stories that he could not have reported without providing "a meaningful promise of confidentiality to sources," including a report on organized crime's role in the illegal dumping of toxic waste that sparked a grand jury investigation and a report on the misuse of union funds that led to the ouster of the union president. *Id.* ¶¶ 6-8.

Pierre Thomas, recently held in contempt in the *Wen Ho Lee* case, recounted many similar examples in his testimony in that litigation. Information received from confidential sources enabled Mr. Thomas to report on the progress of the Oklahoma City bombing investigation in a manner that proved instrumental in helping a nervous public understand that the bombing was not the work of foreign terrorists, and his award-winning coverage of the September 11 attacks unearthed important information, provided by confidential sources, about the FBI's advance knowledge of the activities of those responsible for that tragedy. As Mr. Thomas testified: "If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles." *Id.* at B22 ¶ 14(b).

Confidential sources are not only critical to investigative journalists like Messrs. Taricani and Thomas, but are equally important to the daily reporting of more routine news stories. Reporters regularly consult background sources to confirm the accuracy of official news pronouncements and to understand their broader context and significance. A. at 38,

¶ 5 (testimony of Jack Nelson, former *Los Angeles Times* Washington bureau chief, explaining the crucial role that confidential sources played in his reporting through the administrations of six Presidents). Without the ability to speak off the record to sources in the government who are not officially authorized to speak, reporters would be relegated to spoon feeding the public with little more than the "official" statements of public relations officers. *Id.* at 49, ¶ 12 (testimony of Scott Armstrong). For this reason, among others, news reporting based on confidential source material regularly receives the nation's most coveted journalism awards, including the Polk Awards for Excellence in Journalism[8] and the coveted Pulitzer Prize.[9]

Indeed, journalistic experience confirms that, in many circumstances, important information is provided to the press in confidence precisely because the government has taken steps to conceal it by making its unauthorized disclosure

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[8] This year, the Polk Awards for Magazine Reporting, Military Reporting, and Sports Reporting all went to articles based, in significant part, on information and other material provided by confidential sources. *See* www.brooklyn.liu.edu/polk/polk04.html (listing awards).

[9] For example, the 1996 Pulitzer Prize for National Reporting was awarded to the *Wall Street Journal* for its articles reporting on the use of ammonia to heighten the potency of nicotine in cigarettes, which was based on information revealed in confidential, internal reports prepared by a tobacco company. *See, e.g.*, Alix M. Freedman, *'Impact Booster': Tobacco Firm Shows How Ammonia Spurs Delivery of Nicotine*, WALL ST. J., Oct. 18, 1995, at A1. In 2002, the Prize was awarded to the staff of *The Washington Post* "for its comprehensive coverage of America's war on terrorism, which regularly brought forth new information together with skilled analysis of unfolding developments." *See* www.pulitzer.org/year/2002/national-reporting. The *Post*'s series was based, in significant part, on information provided by unnamed public officials, both here and abroad. *See, e.g.*, Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, Oct. 3, 2001, at A1.

unlawful. Standing alone, that latter fact cannot be sufficient justification to conclude, as did the court below, that no First Amendment or other public interest is served in allowing reporters to protect the anonymity of such sources. In the area of national security reporting, for example, journalists and public officials alike have come to recognize that "virtually everything is classified" so that verification of "something as mundane as a press briefing involves talking to scores of sources who are not authorized to add further detail and could be subject to sanctions for doing so." *Id.* at 50, ¶ 13. As a result, most high-level government officials serve as confidential sources at one time or another, in "an untidy but well-established accommodation" that functions as a safety valve allowing vitally important information to be transmitted to the public notwithstanding formal secrecy restrictions. *Id.* at 50, 53, ¶¶ 13, 19.[10]

The information anonymous sources make available to the public through the press is vitally important to the operation of our democracy and the oversight of our most powerful institutions, both public and private. Among the many compelling examples of valuable journalism that would never have been possible if a reporter could not credibly have pledged confidentiality to a source are the following:

Pentagon Papers – The Pentagon's secret history of America's involvement in Vietnam was, of course, leaked to *The New York Times* and *The Washington Post*. *See New York Times Co. v. United States*, 403 U.S. 713 (1971). In

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[10] A survey conducted during the Reagan administration by Harvard University of 483 senior government officials (including two former secretaries of state) found that forty-two percent of the responding officials felt it appropriate to provide information to the press in confidence. *See* Jim Anderson, *Washington News*, UNITED PRESS INTERNATIONAL, Oct. 27, 1986.

refusing to enjoin publication of the leaked information, members of this Court recognized that the newspapers' sources may well have broken the law, *id.* at 754 (Harlan, J., dissenting), and they were in fact prosecuted, albeit unsuccessfully, after later coming forward. *See* Sanford J. Ungar, *Federal Conduct Cited As Offending 'Sense of Justice'; Charges Dismissed in 'Papers' Trial*, WASH. POST, May 12, 1973, at A1. Nevertheless, "[i]n revealing the workings of the government that led to the Vietnam war, the newspapers nobly did precisely that which the Founders had hoped and trusted they would do," *New York Times Co.*, 403 U.S. at 717 (Black, J., concurring), and there is now a broad consensus that there was no legitimate reason to hide the Papers from the public in the first place.[11]

Neutron Bomb – Journalist Walter Pincus relied on anonymous sources in reporting that President Carter planned to move forward with plans to develop a so-called "neutron bomb," a weapon that could inflict massive casualties through radiation without extensive destruction of property.[12] The public outcry in the wake of these news reports spurred the United States to abandon plans for such a weapon and no Administration has since attempted to revive it.[13] Mr. Pincus,

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[11] Solicitor General Erwin N. Griswold, who argued the government's case, wrote some twenty years later that he had not "seen any trace of a threat to the national security from the publication." Erwin N. Griswold, *Secrets Not Worth Keeping; The Courts and Classified Information*, WASH. POST, Feb. 15, 1989, at A25.

[12] *See, e.g.*, Walter Pincus, *Carter Is Weighing Radiation Warhead*, WASH. POST, June 7, 1977, at A5; Walter Pincus, *Pentagon Wanted Secrecy On Neutron Bomb Production; Pentagon Hoped To Keep Neutron Bomb A Secret*, WASH. POST, June 25, 1977, at A1.

[13] *See* Don Phillips, *Neutron Bomb Reversal; Harvard Study Cites '77 Post Articles*, WASH. POST, Oct. 23, 1984, at A12 (quoting former Defense Secretary Harold Brown as stating that "[w]ithout the [*Post*] articles, neutron warheads would have been deployed").

who never received a subpoena concerning the neutron bomb or any other matter in his decades-long career, has recently received *two*—one from Respondent and one in the *Lee* case.

Fertility Fraud – In 1996, the *Orange County Register* received the Pulitzer Prize for its reporting on the unethical practices of the previously acclaimed UCI fertility clinic in Irvine, California. Using putatively confidential medical records obtained from an anonymous source, the paper documented how eggs retrieved from one patient were implanted in another, without the knowledge or consent of the donor.[14] The newspaper eventually discovered and reported that at least sixty women were victims of such theft by the clinic.[15] The disclosure of these records to the *Register* may have violated applicable law, yet the facts that the newspaper reported resulted in the criminal prosecution of the physicians involved, "prompted the American Medical Association to rewrite its fertility-industry guidelines," and instigated legislative action.[16]

Enron – In a groundbreaking series of articles published in 2001, the *Wall Street Journal* relied on confidential sources and leaked corporate documents to reveal the illegal accounting practices of a company that had "routinely made published lists of the most-admired and innovative

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[14] Susan Kelleher & Kim Christensen, *Fertility Fraud; Baby Born After Doctor Took Eggs Without Consent*, ORANGE COUNTY REGISTER, May 19, 1995, at A1.

[15] Susan Kelleher, Kim Christensen, David Parrish & Michael Nicolosi, *Clinic Scandal Widens*, ORANGE COUNTY REGISTER, Nov. 4, 1995, at A16.

[16] Kim Christensen, *Fertility Bills Seen as Effective Steps*, ORANGE COUNTY REGISTER, Aug. 30, 1996, at A26.

companies in America."[17] Among other things, confidential sources provided the *Journal* with "confidential" information about two partnerships operated by Enron Chief Financial Officer Andrew Fastow, which were used to hide corporate debt from the company's investors.[18]

Abu Ghraib – In April 2004, CBS News and Seymour Hersh, writing for *The New Yorker*, first reported accounts of abuse of detainees at Abu Ghraib prison in Iraq.[19] Relying on photographs graphically depicting such abuse in the possession of Army officials and a classified report by Major General Antonio M. Taguba that was "not meant for public release,"[20] CBS and Hersh documented the conditions of abuse in the Iraqi prison. After these incidents became public, other military sources who had witnessed abuse stepped forward, but only "on the condition that they not be identified because of concern that their military careers would be ruined."[21]

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[17] Rebecca Smith & John R. Emshwiller, *Trading Places: Fancy Finances Were Key to Enron's Success, And Now to its Distress*, WALL ST. J., Nov. 2, 2001, at A1.

[18] Rebecca Smith & John R. Emshwiller, *Enron CFO's Partnership Had Millions in Profit*, WALL ST. J., Oct. 19, 2001, at C1; John R. Emshwiller & Rebecca Smith, *Corporate Veil: Behind Enron's Fall, A Culture of Operating Outside Public's View*, WALL ST. J., Dec. 5, 2001, at A1.

[19] 60 Minutes II, Apr. 28, 2004, www.cbsnews.com/stories/2004/04/27/60II/main614063.shtml?CMP=ILC-SearchStories; Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER, May 10, 2004.

[20] Hersh, *supra* note 19.

[21] *See, e.g.*, Todd Richissin, *Soldiers' Warnings Ignored*, BALT. SUN, May 9, 2004, at 1A (interviewing anonymous soldiers who had witnessed abuse at Abu Ghraib); Miles Moffeit, *Brutal Interrogation in Iraq*, DENVER POST, May 19, 2004, at A1 (relying on confidential "Pentagon documents" and interview with a "Pentagon source with knowledge of internal investigations into prisoner abuses").

BALCO – In 2004, the *San Francisco Chronicle* published details of grand jury testimony given by some of the most prominent athletes in professional sports, part of a Pulitzer-Prize winning series of articles about the extent to which performance-enhancing drugs had infiltrated both professional and amateur sports.[22] Baseball players Barry Bonds and Jason Giambi and other prominent athletes testified before the federal grand jury investigating the distribution of undetectable steroids by the Bay Area Laboratory Cooperative ("BALCO"). In some instances, their testimony was squarely at odds with their public denial of steroid use.[23] While the *Chronicle's* sources may have violated grand jury secrecy rules, the newspaper's reporting led to congressional hearings on steroid use in Major League Baseball as well as a decision by its Commissioner to tighten rules regarding the use of banned substances.

The decision below plainly threatens this kind of journalism. The compelled disclosure of the sources that enabled the press to report these stories "undoubtedly would have a ripple effect, silencing whistleblowers and other government employees who might otherwise cooperate with the press in exposing government wrongdoing." A. at 39, ¶ 7. As has been explained by *New York Times* reporter Jeff Gerth, another Pulitzer Prize-winning reporter who has recently been held in contempt by a federal court:

> Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain

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[22] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Giambi Admitted Taking Steroids*, S.F. CHRONICLE, Dec. 2, 2004, at A1; Mark Fainaru-Wada & Lance Williams, *What Bonds told BALCO Grand Jury*, S.F. CHRONICLE, Dec. 3, 2004, at A1.

[23] *See, e.g.*, Mark Fainaru-Wada & Lance Williams, *Sprinter Admitted Use of BALCO 'Magic Potion,'* S.F. CHRONICLE, June 24, 2004, at A1.

> cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. . . . Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality. . . .

App. at B37 ¶ 15. *Los Angeles Times* reporter and Pulitzer Prize recipient Bob Drogin, also now in contempt of a federal court, similarly expressed this undeniable truth during his deposition in the *Lee* litigation:

> I have thought long and hard about this, and unlike you attorneys here in the room, I do not have subpoena power or anything else to gather information. I have what credibility I have as a journalist, I have the word that I give to people to protect their confidentiality. If I violate that trust, then I believe I can no longer work as a journalist.[24]

Especially in the wake of the court of appeals' decision in this case, the Court's guidance is essential to preserve the ability of the American press to engage in this kind of reporting that would be impossible if journalists were powerless to make commitments of confidentiality in appropriate circumstances. *Amici* respectfully submit that a

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[24] Dep. of R. Drogin, *Lee v. U.S. Dep't of Justice*, Civ. A. No. 99-3380, Jan. 8, 2004, at 38:2-9. In an affidavit submitted in that same proceeding, Mr. Drogin recounted his necessary reliance on confidential sources to report about such matters as Saddam Hussein's efforts to circumvent U.N. sanctions, the failure of U.S. weapons inspectors to find post-war evidence of weapons of mass destruction, and the extent of North Korea's nuclear ambitions. App. at B2-B5 ¶¶ 3-4.

compilation of those serious crimes that have in fact gone unresolved because a journalist was permitted to protect his source would be a very short list indeed and would pale in comparison to the scores of news reports containing valuable information gleaned from confidential sources. Thus, while it is undoubtedly true that "[t]he right to remain anonymous may be abused when it shields fraudulent conduct," it remains the case that, "in general, our society accords greater weight to the value of free speech than to the dangers of its misuse." *McIntyre*, 514 U.S. at 357.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PROTECTION OF ANONYMOUS SPEECH AND THE HISTORICAL TRADITION ON WHICH THAT PROTECTION IS PREMISED

Notwithstanding the overwhelming evidence that confidential sources are essential to effective news reporting, the court of appeals read this Court's decision in *Branzburg* as holding that the First Amendment is simply irrelevant when a grand jury demands identification of a reporter's confidential sources. Petitioners persuasively demonstrate that the court of appeals' construction of *Branzburg* is at odds with the decisions of several of its sister circuits, and our purpose is not to repeat those arguments here. From the perspective of these *amici*, the overarching point is that the court of appeals' conclusion cannot be squared with this nation's historic tradition of protecting outlets for anonymous speech. The First Amendment's protection of such expression is grounded firmly in the experience of the Colonial-era press, which fought valiantly to protect the anonymity of those who often spoke through its pages. Everything this Court has said about the protection of anonymous speech under the First Amendment, in every other context and particularly in several post-*Branzburg* decisions, supports the journalistic experience described

above and is inconsistent with the court of appeals' interpretation of *Branzburg* in this case.

In a variety of decisions addressing anonymous speech outside the context of the reporters' privilege, this Court has emphasized that the right to speak to the public anonymously is protected by the First Amendment in significant part because, when the Bill of Rights was enacted, the Founders understood the importance of such speech to maintaining an informed citizenry. In *Talley v. California*, this Court expressly recognized that the First Amendment was enacted in significant part to ensure that printers, the "press" of their day, could not be compelled by the government to reveal the identities of those authors whose works they had agreed to disseminate anonymously:

> Before the Revolutionary War colonial patriots frequently had to conceal their authorship or distribution of literature that easily could have brought down on them prosecutions by English-controlled courts. Along about that time the Letters of Junius were written and the identity of their author is unknown to this day. Even the Federalist Papers, written in favor of the adoption of our Constitution, were published under fictitious names.

362 U.S. 60, 64-65 (1960).

More recently, in his concurring opinion in *McIntyre*, Justice Thomas described the experience of the eighteenth century "news media," which then consisted largely of journals that were really collections of contributions from individual authors. Those authors not infrequently requested anonymity and their identities were therefore known only to the printers, who fought to honor the promises of confidentiality they had made against efforts by colonial authorities to compel the disclosure of their authors' identities. *McIntyre*, 514 U.S. at 360 (Thomas, J.,

concurring). Indeed, the controversy that is credited with first establishing uniquely American principles of freedom of the press – the prosecution and acquittal of New York publisher Jon Peter Zenger on charges of seditious libel – arose out of Zenger's refusal to identify the source(s) of material appearing in his newspaper harshly criticizing New York's royal government. Even after Zenger was arrested and charged with criminal responsibility as the publisher, he maintained his refusal to disclose his "sources." *Id.* at 361.

Similarly, in 1779, Elbridge Gerry and other members of the Continental Congress sought to institute proceedings to compel a Pennsylvania newspaper publisher to identify the author of a column criticizing the Congress. Ultimately, arguments that "'[t]he liberty of the Press ought not to be restrained'" prevailed and the Congress did not take action to compel such disclosure. *Id.* at 361-62 (citation omitted). In 1784, the New Jersey Legislature embarked on another unsuccessful effort to compel a newspaper editor to identify the author of a critical article. *Id.* at 362-63. These episodes were fresh in the mind of the Framers who, as Justice Thomas chronicled in *McIntyre*, unanimously "believed that the freedom of the press included the right to publish without revealing the author's name." *Id.* at 367.

While journalism has changed dramatically since the late eighteenth century, today's reporters, publishers and broadcasters perform essentially the same function as their Colonial-era predecessors: exercising their editorial judgment to enable some anonymous sources of information and opinion to reach a broad audience. Indeed, when newspaper editor Isaac Collins refused to comply with the New Jersey Legislature's demands discussed above on the grounds that to testify would "'betray the trust reposed in me, and be far from acting as a faithful guardian of the Liberty of the Press,'" he articulated exactly the same reasons why

Petitioners and other journalists employed by many of these *amici* have respectfully declined to comply with the subpoenas served on them. *Id.* at 362 (citation omitted).

The enduring lessons this Court has drawn from history validate *amici*'s showing that important information will be lost to the public if journalists cannot reliably promise anonymity to sources. The underlying rationale permeating almost all of this Court's decisions protecting the right to speak anonymously is that without effective legal protection of that right, would-be speakers will remain silent and a significant amount of important speech will be lost. Thus, in *Talley*, this Court invalidated an ordinance requiring that leaflets identify an author on the grounds that "identification and fear of reprisal might deter perfectly peaceful discussions of public matters of importance." 362 U.S. at 65. In *McIntyre*, the Court recognized that election workers may well decide to remain anonymous out of "fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one's privacy as possible." 514 U.S. at 341-42.[25] The same logic applies to those anonymous sources who turn to journalists as their conduit to the public. Indeed, two centuries of evidence and

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[25] *See also Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 166 (2002). Communications between a journalist and a source are far more analogous to the personal leafleting and canvassing at issue in *Talley*, *McIntyre* and *Watchtower* than to the campaign finance disclosure provisions approved in both *McConnell v. FEC*, 540 U.S. 93 (2003), and *Buckley v. Valeo*, 424 U.S. 1 (1976), on the grounds that they deter systemic political corruption. In fact, even in the campaign finance context, exceptions to the constitutionality of compelled disclosure provisions have been recognized where there is a "'reasonable probability'" that disclosure would subject an individual wishing to remain anonymous to "'threats, harassment or reprisals.'" *McConnell*, 540 U.S. at 198 (citation omitted). Both history and the experience of journalists demonstrate that is precisely why reporters' sources request anonymity.

experience effectively answer *Branzburg*'s query about whether any "significant constriction of the flow of news to the public" would result from compelling journalists to divulge the names of their sources. 408 U.S. at 693.

Finally, the lessons of history after the Revolutionary era underscore why journalists find themselves at a crossroads at this moment, and why it is therefore important for this Court to review and resolve, once and for all, this issue of obvious public importance. While we are not aware of any specific surveys on the topic, what evidence exists strongly suggests that, apart from an historical exception or two that actually proves the rule, the criminal justice system has for the most part voluntarily left journalists alone. There appear to be no reported judicial decisions addressing subpoenas to reporters until roughly the beginning of the twentieth century. Only roughly a half-dozen can be found prior to the 1950s, and several of those arose because the journalist himself was the target of a criminal investigation. *See id.* at 685-86 (citing cases).[26] And, as the Petitioners have explained, during those brief, exceptional periods when subpoenas were issued to reporters in significant numbers, most notably in the years immediately surrounding this Court's decision in *Branzburg*, both the states and most lower federal courts promptly responded by recognizing a formal legal privilege. History thus demonstrates that both "reason and experience" support the same result as a matter of federal common law. *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

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[26] Indeed, prior to the late 1960s, we are aware of only two federal court decisions related to federal grand jury or criminal trial subpoenas issued to journalists, and both excused the reporters from testifying on grounds unrelated to privilege. *See Burdick v. United States*, 236 U.S. 79 (1915) (journalist was entitled to assert a Fifth Amendment privilege); *Rosenberg v. Carroll*, 99 F. Supp. 629 (S.D.N.Y. 1951) (excusing journalist because information sought was not sufficiently relevant).

The recent surge in the number of subpoenas, the dramatic increase in the severity of contempt penalties, the startling pronouncement by the court of appeals in this case that the First Amendment has no bearing on the issue and its inability to agree whether federal common law even speaks to the question all stand in marked contrast to this nation's historic tradition of respecting both the right to speak anonymously in general and the ability of the press to act as a conduit for such anonymous speech in particular. If the Court does not seize this opportunity to address this vital issue, other courts will surely follow the lead of the D.C. Circuit and these trends will only accelerate in a manner that will fundamentally impact the ability of the American public to receive information about the operation of its government and the state of the world in which we live.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to grant the petitions for *certiorari*.

Respectfully submitted,

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APPENDIX A

ABC, Inc., alone and through its subsidiaries, owns ABC News, the ABC Radio Network, abcnews.com, and local broadcast television and radio stations that regularly gather and report news to the public. ABC produces, among other programs, the news programs *World News Tonight with Peter Jennings*, *20/20* and *Nightline*. ABC received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Advance Publications, Inc. is a privately held communications company that, directly or through subsidiaries, publishes daily newspapers in over 25 cities and weekly business journals in over 40 cities throughout the United States. It also, directly or through subsidiaries, owns The Conde Nast Publications, Fairchild Publications, Inc., Parade Publications, and the Golf Digest Companies, which together publish over 25 magazines with nationwide circulation.

The Associated Press is a not-for-profit mutual news cooperative. The members of AP are more than 1,500 newspapers and more than 5,000 television and radio stations throughout the United States. AP also serves thousands of subscribing newspapers, news networks and other publishers and distributors of news worldwide. Founded in 1848, AP is now the largest newsgathering organization in the world. AP received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill and AP reporter Josef Hebert has been held in contempt and fined $500 per day for declining to reveal confidential sources of information about Dr. Wen Ho Lee, who is also suing the government for alleged violations of the Privacy Act. Those fines have been stayed pending appeal.

The Association of American Publishers, Inc. is the principal trade association for the U.S. book publishing industry with over 300 members, comprising most of the

major commercial book publishers in the United States, as well as smaller and medium-sized houses, non-profit publishers, university presses and scholarly societies.

Cable News Network LP, LLLP ("CNN") is a subsidiary of Turner Broadcasting System, Inc., a Time Warner company. CNN is the world's largest news organization with over a dozen television and radio news networks and websites available worldwide, as well as several news programming services, which are provided to affiliates domestically and worldwide. CNN employs more than 3,000 news professionals, who gather news throughout the world. Former CNN reporter Pierre Thomas has been held in contempt and fined $500 per day for declining to reveal confidential sources of information about Dr. Wen Ho Lee. Those fines have been stayed pending appeal. CNN also received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

CBS Broadcasting Inc., a wholly owned subsidiary of Viacom Inc., produces and broadcasts news, public affairs, and entertainment programming. CBS News produces morning, evening, and weekend news programming, as well as news and public affair magazine programs such as *60 Minutes* and *48 Hours Investigates*. CBS owns and operates broadcast television stations nationwide and, through another Viacom subsidiary, Infinity Broadcasting Corporation, owns and operates radio stations throughout the country. CBS received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Dow Jones & Company, Inc. is the publisher of, *inter alia*, *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, a news site on the world wide web with over 700,000 paying subscribers; the Dow Jones Newswires, real-time, 24-hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper

of business and finance; and, through Ottaway Newspapers, Inc., its subsidiary, more than twenty daily and weekly newspapers.

DR Partners d/b/a Stephens Media Group is a nationwide newspaper company, which publishes daily and weekly newspapers in eight states from North Carolina to Hawaii, including the *Las Vegas (NV) Review-Journal*, the largest daily newspaper in Nevada.

Gannett Co., Inc. is an international news and information company that publishes 101 daily newspapers in the United States with a combined daily paid circulation of 7.6 million, including *USA TODAY*, which has a circulation of 2.3 million. Gannett publishes a variety of non-daily publications, including *USA Weekend*, a weekly newspaper magazine with a circulation of 22.7 million. Gannett's 21 television stations cover 17.9 percent of the United States. Gannett received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Gray Television, Inc. is a communications company headquartered in Atlanta, Georgia, which operates 16 CBS-affiliated television stations, eight NBC-affiliated television stations, seven ABC-affiliated television stations and five daily newspapers.

Gruner + Jahr USA Publishing reaches one of the largest readerships in America, selling nearly 200 million magazines each year. Gruner + Jahr USA Publishing's six core titles – *Child*, *Family Circle*, *Fast Company*, *Fitness*, *Inc.* and *Parents* – are leaders in the business, fitness, parents and women's service markets. Beyond its core titles, Gruner + Jahr USA Publishing also reaches consumers through the Parents Media Group, books and licensing, custom publishing and new media divisions.

The Hearst Corporation is a diversified, privately held media company that publishes consumer magazines, business publications and newspapers, including the *Houston Chronicle*, the *San Francisco Chronicle* and the *Seattle Post-Intelligencer*. Hearst also owns a leading features syndicate, has interests in several cable television networks, produces programming for television and is the majority owner of Hearst-Argyle Television, Inc., which owns and operates numerous broadcast stations. Federal prosecutors have requested that the *San Francisco Chronicle* reveal the source of information provided to it regarding the grand jury investigation of the distribution of steroids by the Bay Area Laboratory Cooperative or "BALCO".

Landmark Communications, Inc. is a privately held media company with interests in newspapers, television broadcasting, cable programming and electronic publishing. Its newspapers include *The Virginian-Pilot*, the *Greensboro News & Record*, *The Roanoke Times* and more than one hundred community newspaper and special interest publications. Landmark Communications, Inc. owns television stations in Las Vegas (KLAS-TV) and Nashville (WTVF-TV), as well as the Weather Channel, which produces continuous, 24-hour national, regional and local weather-related programming received by more than 87 million households nationwide.

Magazine Publishers of America ("MPA") is a national trade association including in its present membership more than 240 domestic magazine publishers who publish over 1,400 magazines sold at newsstands and by subscription. MPA members provide broad coverage of domestic and international news in weekly and biweekly publications, and publish weekly, biweekly and monthly publications covering consumer affairs, law, literature, religion, political affairs, science, sports, agriculture, industry and many other interests,

avocations and pastimes of the American people. MPA has a long and distinguished record of activity in defense of the First Amendment.

Media General, Inc. is a diversified communications company operating leading newspapers, television stations and online enterprises, primarily in the Southeastern United States. The company's publishing assets include three metropolitan newspapers, *The Tampa Tribune*, the *Richmond Times-Dispatch*, and the *Winston-Salem Journal*; 22 daily community newspapers in Virginia, North Carolina, Florida, Alabama and South Carolina; and more than 100 weekly newspapers and other publications. The company's broadcasting assets include 26 network-affiliated television stations that reach more than 30 percent of the television households in the Southeast.

The National Newspaper Association ("NNA") is the national voice of community newspapers, representing owners, publishers, and editors of America's community newspapers. The NNA has approximately 3,200 newspaper members.

National Public Radio, Inc. ("NPR") is a District of Columbia non-profit membership corporation. It produces and distributes its radio programming through, and provides trade association services to, nearly 800 public radio member stations located throughout the United States and in many U.S. territories. NPR's award-winning programs include *Morning Edition*, *All Things Considered*, and *Talk of the Nation* and serve a growing broadcast audience of over 23 million Americans weekly. NPR also distributes its broadcast programming online (adding additional reporting and features), to foreign countries through satellite and cable systems worldwide, and to U.S. Military installations via the American Forces Radio and Television Service. NPR

received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

NBC Universal is one of the world's leading media and entertainment companies. Formed in May 2004 through the combining of NBC and Vivendi Universal Entertainment, NBC Universal owns and operates the NBC television network, a Spanish-language network (Telemundo), NBC News, and several news and entertainment networks including MSNBC and CNBC. NBC News produces the *Today* show, *NBC Nightly News with Brian Williams*, *Dateline* and *Meet the Press*. NBC Universal also owns and operates 29 television stations, including WJAR in Rhode Island. WJAR reporter James Taricani recently served a four-month sentence of home confinement for declining to reveal who leaked to him a videotape capturing alleged corruption by local government officials. An NBC News reporter received a subpoena seeking confidential sources issued by the Respondent in this case and CNBC received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Newsweek, Inc., a wholly owned subsidiary of The Washington Post Company, publishes the weekly news magazines *Newsweek* and *Newsweek International*, which are distributed nationally and internationally, and *Arthur Frommer's Budget Travel* magazine, which is distributed nationally. *Newsweek* received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

Random House, Inc., the world's largest English-language general interest trade book publisher, is a division of Bertelsmann AG, one of the foremost international media companies in the world. Its more than 100 imprints in the U.S. and in sixteen countries globally publish some of the

most influential and popular fiction and nonfiction authors in hardcover, paperback, audio, and digital formats.

Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend First Amendment rights and freedom of information interests of the news media. The Reporters Committee provides representation, guidance, and research in First Amendment litigation. The Reporters Committee was founded in 1970 in response to a wave of government subpoenas directed at journalists.

The Society of Professional Journalists ("SPJ") is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry; works to inspire and educate the next generation of journalists; and protects the First Amendment guarantees of freedom of speech and press.

Tribune Company operates businesses in publishing, broadcasting and on the Internet. It reaches more than 80 percent of U.S. households, and is the only media company with newspapers, television stations and web sites in the nation's top three markets. In publishing, Tribune operates 12 market-leading daily newspapers, including the *Baltimore Sun*, *Newsday*, the *Chicago Tribune*, and the *Los Angeles Times*. In broadcasting, Tribune properties include 26 television stations and Superstation WGN on national cable. Both the *Los Angeles Times* and a former *Baltimore Sun* reporter received subpoenas seeking their confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill and *Los Angeles Times* reporter Bob Drogin has been held in contempt and fined $500 per day for declining to

reveal confidential sources of information about Dr. Wen Ho Lee. Those fines have been stayed pending appeal.

The Washington Post is a leading newspaper with a nationwide daily circulation of over 759,000 and a Sunday circulation of over 1.03 million. *Washington Post* reporter Walter Pincus received a subpoena seeking his confidential sources in the Privacy Act lawsuit instituted by Dr. Wen Ho Lee and two *Post* reporters, including Mr. Pincus, received subpoenas seeking their confidential sources issued by the Respondent in this case. The *Post* also received a subpoena seeking its confidential sources in the Privacy Act lawsuit instituted by Dr. Steven Hatfill.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE, Plaintiff, - against – UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	Civ. A. No. 99-3380 (TPJ)

AFFIDAVIT OF BOB DROGIN

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

BOB DROGIN, being duly sworn, states:

1. I submit this affidavit in response to the Court's Order to Show Cause. Except where otherwise stated, I have personal knowledge of the facts herein.

2. I have been a professional journalist for 28 years and have won numerous national awards for my work. Since

1998, I have covered national security, focusing on intelligence, in the Washington bureau of the *Los Angeles Times*. In the past year, my work has been cited in The New Yorker, the New York Review of Books, Columbia Journalism Review and by other news organizations. I was stationed overseas from 1989 to 1997, first as chief of the Manila bureau of the *Los Angeles Times* and then as chief of the paper's Johannesburg bureau. Prior to that, I spent six years as a national correspondent in the paper's New York bureau. I have also worked at the *Philadelphia Inquirer* and at the Charlotte (N.C.) *Observer*, where I helped lead a team of reporters who won the 1981 Pulitzer Prize for Meritorious Public Service for a series entitled "Brown Lung: A Case of Deadly Neglect."

3. Although I prefer to use on-the-record sources, as I believe most journalists do, throughout my career I have relied on confidential sources when necessary to provide important news to my readers, or to provide context for understanding events. Quite simply, I have found that the ability to promise sources confidentiality is often essential to gather and disseminate the news, especially when covering stories about sensitive topics such as foreign affairs, national security, and intelligence.

4. For example, I have relied heavily on confidential sources to cover intelligence and anti-terrorism initiatives since the attacks of Sept. 11, 2001:

a. On Sept. 12, 2001, I contributed to a story that preliminarily identified Osama bin Laden as the mastermind behind the devastating attacks on the World Trade Center and the Pentagon. The story, which contained details of the gathering investigation, relied heavily on well-placed sources within the intelligence community who spoke on the condition that neither I nor my colleagues reveal their identities. This article was published at a time when U.S.

officials were not prepared to assign responsibility for the attacks and when representatives of the Taliban government in Afghanistan were denying any involvement by bin Laden's Al Qaeda network. A copy of this story is attached hereto as Exhibit 1.

b. In the immediate aftermath of the terrorist attacks, confidential sources provided information about the CIA's rapid mobilization efforts with a "virtual blank check" from the Bush Administration, including initiatives to reassign and recall analysts and operatives, rebuild an Afghanistan network that had been largely dismantled following the Soviet withdrawal in 1989, form relationships with ethnic fighters in Afghanistan, and publicize a bounty on Osama bin Laden within Muslim communities. Another story that I co-authored in October 2001 described the extent to which the American intelligence community considered all options available to fight terrorism – including torture, assassination, and targeting civilians. As one confidential source, a former CIA official, told me, "there is a lot of experimentation that's going on." Copies of these stories are attached hereto as Exhibit 2.

c. A June 1, 2002, article that I co-authored reported that the CIA had by then paid tens of millions of dollars to informers in Afghanistan and Pakistan for intelligence about the whereabouts of bin Laden. Details about the cash payouts—which sometimes purchased unreliable or bogus information—came from confidential sources, who spoke on the condition that they not be identified by name. Were my colleague and I not able to promise those sources anonymity, we would not have been able to report fully on the methods being employed in the hunt for bin Laden. Copies of these stories are attached hereto as Exhibit 3.

d. A December 9, 2001 article relied on sources within the U.S. intelligence community to describe the

emerging picture about Al Qaeda terrorist cells in Indonesia, Yemen, and Somalia, as wells as little-noticed U.S. efforts in Bosnia-Herzegovina and the Philippines. Without information provided by these sources, we would not have been able to inform readers fully about the war being waged against terrorism across the globe. A copy of this story is attached hereto as Exhibit 4.

e. In August 2002, at a time when little information was available about the approximately 600 terrorism suspects from 43 countries then in U.S. custody at Guantanamo Bay, confidential intelligence sources revealed that none of the detainees were considered to be Al Qaeda leaders. Rather, the majority of the prisoners were regarded as "low and mid-level" fighters and supporters of the organization. A copy of this story is attached hereto as Exhibit 5.

f. Before ground troops began military action in Iraq, confidential sources provided information on how the Hussein regime's smuggling efforts circumvented U.N. sanctions to purchase military equipment such as night-vision devices, communications gear, and tires for armored personnel carriers. Following the war, a three-month investigation used numerous confidential sources and reviewed more than 800 pages of documents to conclude that this pipeline was broader than previously imagined, and that a Syrian trading company served as the main conduit for Iraq circumvention of the U.N. embargo. Copies of these stories are attached hereto as Exhibit 6.

g. In January 2003, as the United States was building a case for a link between Al Qaeda and Saddam Hussein, confidential sources enabled a colleague and me to report that the Bush Administration's assertion relied on only circumstantial evidence and one Al Qaeda suspect. Indeed, intelligence officials told me that "[t]here isn't a factual basis for such assertions," thus raising serious doubts about one

justification for military action against Iraq. A copy of this story is attached hereto as Exhibit 7.

h. After the war, I reported on the disorganization, delays, and faulty intelligence that plagued searches for weapons of mass destruction, relying on confidential sources to describe the rocky start to weapons inspection. On August 28, 2003, I reported on the failure of U.S. investigators, after reviewing millions of pages of Iraqi government documents, to uncover evidence supporting pre-war claims that Saddam Hussein had secretly acquired chemical and biological weapons. This report relied extensively on sources within the 1,400-member Iraq Survey Group who spoke on the condition that I not disclose their names. Without the cooperation of these sources, I would not have been able to report this important [story]. Copies of these stories are attached as Exhibit 8.

i. On February 20, 2004, I co-wrote a report about the struggles of the CIA's operations in Iraq and Afghanistan. The story exposed many of the problems the agency was confronting in attempting to rebuild its clandestine intelligence service and, specifically, it revealed internal turmoil related to the leadership of the CIA's Baghdad station. The article depended substantially on the cooperation of sources within the agency who spoke on the condition that we not reveal their names. A copy of this story is attached as Exhibit 9.

j. Similarly, confidential sources later provided information fleshing out the intelligence community's faulty reliance on pre-war claims made by an Iraqi defector, later discredited, about Iraq's weapons program. This provided our readers with important information about the evidence supporting pre-war claims by the Bush Administration and Congress to justify U.S. military action in Iraq. Copies of these stories are attached hereto as Exhibit 10.

5. U.S. and foreign government officials often provide context for international political developments and national security issues on condition that they not be identified. Many of these events would not have been reported to my readers – or reported in significantly less detail – without these sources. Some examples from my past reporting include:

a. Information provided by confidential sources within the U.S. intelligence community were central to a Jan. 5, 2003 profile of a metallurgist considered to be the father of Pakistan's nuclear bomb, describing the possible links to nuclear programs in North Korea, Iran, and Iraq. My coverage of U.S. Pakistani political tensions related to Pakistan's nuclear program goes back at least a decade. For example, relying largely on interviews with a "senior Pakistani intelligence official" and with diplomats, all of whom would speak with me only on condition of anonymity, in an April 9, 1993 report I explained to my readers the newly strained relationship between Pakistan and the United States. Without these confidential sources, I would not have been able to provide context for the apparent contradiction of U.S. economic sanctions and threats against Pakistan, at the same time as we continued high-level diplomatic and military visits. Copies of these stories are attached as Exhibit 11.

c. [sic] Confidential sources substantially advanced my reporting on an attempted 1989 military uprising in the Philippines. In a Dec. 12, 1989 story, in particular, such sources revealed that the United States and other Western nations ignored intelligence warnings about a coup attempt that nearly toppled President Corazon Aquino's government. Prior to military action, rebels had sought through back channels Western support for the uprising. This caused the CIA and foreign intelligence agencies to re-examine their procedures. A copy of this story is attached hereto as Exhibit 12.

d. In covering the aftermath of the Gulf War in 1991, I relied significantly on confidential sources, at least in my initial stories, to report on widespread reprisal killings in newly liberated Kuwait. For example, I relied on a "senior Western official" to confirm reports that Kuwaiti military were attacking or detaining Palestinians for a March 14, 1991 article. Copies of these stories are attached hereto as Exhibit 13.

e. On May 10, 1999, I co-wrote a story on the mistaken bombing of the Chinese embassy in Belgrade by a U.S. warplane. Based in part on a confidential source, we reported that officials at the CIA had chosen the target mistakenly and that the target subsequently had been vetted by military strategists, thus revealing a significant deficiency in war-planning procedures. A copy of this story is attached hereto as Exhibit 14.

f. During negotiations between the United States and North Korea over the North Korean nuclear program negotiators, U.S. officials privately explained the status of talks – and information about the extent and purpose of that nation's program – in much greater detail than in official statements. Copies of these stories are attached hereto as Exhibit 15.

g. Similarly, U.S. officials spoke on condition of confidentiality in December 2001 about escalating tensions between India and Pakistan, providing intelligence analysis about the extent of military buildup along the border and the prospects for military action. Without these sources, readers would have had significantly less information about a possible war between two nuclear powers. A copy of this story is attached hereto as Exhibit 16.

6. I was assigned to report about the investigation into allegations that China had obtained U.S. nuclear secrets, including allegations against Wen Ho Lee, because the story

concerned national security issues. My approach to reporting this story, including any use of confidential sources, was consistent with the way I have practiced journalism as a foreign and national security correspondent throughout my career.

7. Based on my personal experience during my many years as a professional journalist, I firmly believe that if sources who would otherwise be willing to speak to me in confidence viewed me as an investigative tool of private litigants, unable to keep their identities confidential as promised, they would, in many cases, not be willing to provide newsworthy information for dissemination to my readers.

/s/

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Bob Drogin

Sworn to before me this
30th day of July, 2004

/s/

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Notary Public

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE, Plaintiff, - against – UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	)	Civ. A. No. 99-3380 (TPJ)

AFFIDAVIT OF H. JOSEF HEBERT

CITY OF WASHINGTON)
) ss.:
DISTRICT OF COLUMBIA)

H. JOSEF HEBERT, being duly sworn, states:

1. I submit this affidavit in response to the Court's Order to Show Cause. Except where otherwise stated, I have personal knowledge of the facts herein.

2. I have been a reporter for The Associated Press ("A.P.") for 34 years. Prior to joining the A.P., I earned my journalism degree from the University of Missouri in 1967, and worked briefly for United Press International in Kansas

City before serving for two years on active duty in the U.S. Army, including a year in Vietnam as an information officer for an infantry division.

3. After joining the Chicago bureau of the A.P. in 1970, I spent time in the A.P.'s Springfield, Ill., New York, and Concord, N.H., bureaus and was promoted to the flagship A.P. bureau in Washington, D.C., in 1977. For most of the past 27 years, I have been a "beat" reporter focusing on environmental, energy, transportation, and nuclear issues.

4. For example, I was one of the A.P. reporters who reported about the Three Mile Island nuclear accident in 1979 and the ensuing investigation by a presidential commission. In 1981, I covered the air-traffic controllers' strike. I followed airline deregulation and wrote about nearly every major aircraft accident in the 1980s. Beginning around 1990, I began reporting exclusively about environmental, energy, and natural resources issues. In 1997, I covered the climate change negotiations in Kyoto, Japan. On these issues, my beat has included Congress, the White House, and federal agencies such as the Energy Department.

5. Although I am not primarily an investigative reporter, like some of the other reporters subpoenaed in this case, throughout my long career as a Washington journalist I have regularly consulted officials on condition of anonymity. This is part of working a beat and occurs in a variety of contexts.

a. At one end of the spectrum, many parts of the federal government officially sanction "background" briefings, at which federal employees who may not have authority to speak to the press on the record provide information about specific topics on the condition that they not be named, or that they be identified only by specific terms, such as "a senior U.S. official." These briefings allow me and other journalists to inform readers of important news. If I refused to abide by the ground rules of such briefings, the

A.P.'s readers would not have access to the news generated at them.

b. Additionally, other news reporters and I frequently use confidential sources to confirm the accuracy of, or provide context to, breaking news developments. Through such relationships with reliable, confidential government sources, whose supervisors may or may not be aware of their contact with the press, I am able to flesh out official announcements, confirm or debunk other news reports, and play "catch up" in following stories that have been broken elsewhere. Officials typically provide confirmation and context to breaking news only upon being promised confidentiality. As a result, confidential sources make my stories more thorough and accurate.

6. Of course, some confidential sources genuinely "leak" information that has not previously been publicly disclosed. I believe that many people, upon hearing the phrase, "confidential source," think of these "Deep Throat" sources. But beat reporters in Washington, D.C., know such sources are rare. Much more important, on a day-to-day basis, are those trusted officials who provide confirmation and background details to news developments. These contacts are especially important at a wire service such as the A.P., because the A.P. must report news very quickly and every minute counts for a reporter following breaking developments. As conscientious journalists, we do not want merely to pass on official government communications to the press, or stories reported elsewhere in the media. Rather, we strive to make efforts to confirm independently the accuracy of what we learn and provide as much context as possible for readers.

7. Over the previous five years, confidential sources revealed or confirmed numerous facts that became central to my A.P. news stories. Some examples include:

- In at least two incidents at U.S. nuclear power plants, rules designed to prevent an unplanned nuclear chain reaction failed. Although the fact of an accident at a U.S.-operated fuel plant in Japan was public, I relied on confidential sources to explain the worker and system errors that caused a nuclear chain reaction. A copy of this story is attached hereto as Exhibit 1.

- In early 2001, the Bush administration planned deep cuts in programs aimed at helping Russia safeguard its nuclear materials. Sources who spoke on condition of anonymity discussed with me the dispute between Energy Secretary Spencer Abraham and the White House over funding for Russian nonproliferation programs. A copy of this story is attached hereto as Exhibit 2.

- Midwestern utilities lobbied to delay the implementation of smog-reducing regulations, according to sources who also revealed that one utility lobbying the White House claimed that a delay would save it $100 million in compliance costs. A copy of this story is attached hereto as Exhibit 3.

- Following Sept. 11, 2001, sources who spoke on condition of anonymity informed me that the Bush administration prepared to acquire 70 million barrels of oil for the government's emergency reserve. A copy of this story is attached hereto as Exhibit 4.

- FBI officials were telling energy companies in late 2001 that intelligence revealed Osama bin Laden had conditionally approved attacks on North American natural gas pipelines and facilities,

according to confidential sources. Subsequently, Attorney General John Ashcroft confirmed the warning. In January 2002, confidential sources confirmed for me that U.S. nuclear power plants were a target for al-Qaida airline attacks. Copies of these stories are attached hereto as Exhibit 5.

- Confidential sources proved essential to my coverage of the status of closed-door negotiations on a comprehensive energy bill in late 2003. For example, in a November 24, 2003 article, I relied on officials speaking on condition of confidentiality to report that the Bush administration, eager to broker a deal, was pressuring Republican leaders to drop liability protections for makers of a gasoline additive. A copy of this story is attached hereto as Exhibit 6.

- In a story about North Korea's restarting of a nuclear reactor, sources speaking on condition of anonymity provided information to me that there was no evidence that North Korea had yet begun processing plutonium to construct nuclear warheads. A copy of this story is attached hereto as Exhibit 7.

8. I came to report about Wen Ho Lee and allegations that U.S. nuclear secrets had been surreptitiously obtained by China as a breaking news story, the same way I have reported numerous stories in my career. I first [started] working on the story on March 8, 1999, when the Department of Energy fired Dr. Lee and issued a press release outlining many of the relevant details. I tried to confirm and explain the information the Energy Department had released and other media were already reporting, including Dr. Lee's name.

9. Based on my personal experience during my many years as a professional journalist, I believe that compelling me, or any journalist, to provide information about the identities of confidential sources will compromise my ability, and the ability of other journalists, to gather and report news and other matters of public concern. Many of my sources work in the government, and if they believed that my promises to keep their identities confidential might be compromised by the compelled disclosure, I would not be able to secure their cooperation and report newsworthy information to my readers provided by them in the future. The result would be not only less news, but less accurate news.

/s/

H. Josef Hebert

Sworn to before me this
28th day of July, 2004

/s/

Notary Public

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE,	)	
Plaintiffs,	)	
	)	Civ. A. No.
	)	1:99-3380 (TPJ)
- against -	)	
UNITED STATES DEPARTMENT OF JUSTICE, ET AL.,	)	
Defendants.	)	

AFFIDAVIT OF PIERRE G. THOMAS

BEFORE ME, the undersigned authority appeared Pierre G. Thomas, who after first being duly sworn by me deposes and says:

1. I am over the age of 18 years and am qualified to make this affidavit under oath. Unless otherwise indicated, the statements in this affidavit are based upon my personal knowledge.

2. I am familiar with, but I am not a party to, this action. I submit this affidavit in response to this Court's Order to Show Cause, issued June 29, 2004, and to further demonstrate why I should not be held in contempt.

3. I have been employed as a professional journalist for twenty years. I graduated in 1984 from Virginia Polytechnic Institute and State University. I am a member of the National Association of Black Journalists.

4. I have been a national-affairs journalist for *The Washington Post*, Cable News Network ("CNN"), and currently, ABC News where I am the correspondent assigned to cover the United States Department of Justice. At all three news organizations, I have reported on numerous matters of public significance.

5. Much of my work as a professional journalist has concerned the Justice Department and other law enforcement agencies. I frequently report upon the mishandling of operations and investigations by Government agencies.

6. At all times relevant to this action, I was a CNN broadcast reporter. In my deposition in this matter, I was questioned about three 1999 news reports published on CNN's website concerning security problems at Los Alamos National Laboratory, two dated April 28, 1999, and one dated October 14, 1999.

7. I was not questioned about a number of other articles and broadcasts that I wrote or helped to write in the course of my reporting for CNN on the investigation and prosecution of Wen Ho Lee. In several of these, I focused on the shortcomings in the Government's case. Specifically:

- prior to any charges being filed against Dr. Lee, I reported on September 22, 1999 that the Government planned to expand its investigation after admitting that their initial focus on Dr. Lee was too narrow.
- I also reported on July 26, 1999 and September 22, 1999 (as well as on other dates) the opinions that Dr. Lee was targeted as a suspect because of his nationality and that likely he would never face espionage charges because the Government could not prove that he gave classified information to anyone.

- On the same day Dr. Lee was indicted, on December 10, 1999, I again reported that the Government's case had no evidence Dr. Lee gave tapes to anyone or that he had been in contact with any foreign government after the tapes disappeared.

- After the judge released Dr. Lee on bail, on August 25, 2000 and on August 29, 2000, I reported on an FBI agent who later admitted that testimony in connection with an earlier bail petition had misled the judge. Further, I reported that the government still lacked evidence that Dr. Lee gave the downloaded tapes to anyone.

- Finally, in September 2000, after Dr. Lee pled guilty and was released from prison, I reported on congressional and White House criticism of the government's investigation of Dr. Lee.

Copies of some of my reporting on the flaws in the government's case against Dr. Lee are attached as composite Exhibit A.

8. In reporting for news organizations, I have regularly found it necessary to rely upon information provided by people who agreed to speak with me only if I agreed to keep their identities confidential. In general, these sources extract this promise from me because their position in the Government or the private sector puts them at significant risk if they disclose the information they wish to provide to me, but they believe the public needs to know this information. In every case in which I have agreed to keep a source confidential, information of vital concern to the public otherwise would have remained shielded from the public's view.

9. The press is the conduit for the flow of information that enables the public to monitor its Government. The ability of journalists like me to promise confidentiality helps keep the flow of this type of information unobstructed. Otherwise, the information that flows to the public would in many cases be incomplete, biased, or stifled.

10. The exposure of ineffective or improper Government activities by my confidential sources has, on numerous occasions, led to changes in the law or Government policy in ways that are unequivocally positive for the citizenry.

11. (a) For example, in 1991 as a Staff Writer for *The Washington Post*, I was part of a team of journalists that became finalists for a Pulitzer Prize and was awarded on two different occasions the Morton Mintz Investigative Award for a series of articles about illegal gun-running in Washington, D.C. Gun-runners would pay straw purchasers – typically, needy or drug-addicted Virginia residents – to buy guns in Virginia. The gun-runners would then take delivery and sell the weapons in the District, where the purchase and importation of guns is illegal. The guns would turn up at crime scenes all over the District. The articles on which I worked focused on what little law enforcement was doing or could do to enforce existing laws in both jurisdictions.

(b) Many of these articles relied on information provided by confidential sources, including federal and state law enforcement officials. For example, confidential government sources identified for me loopholes in existing laws that allowed straw purchasers to buy guns undetected and demonstrated that many straw-purchasers were not prosecuted. If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government's failure to address a serious issue of personal safety.

(c) Fewer than six months after the publication of my first article, the Virginia Legislature began examining the problem of gunrunning. Not long thereafter, the Legislature passed tighter gun laws, including a one-gun-per-month limit on handgun purchases, to try to put a halt to the straw purchase schemes.

(d) Copies of selected articles that I wrote or helped to write concerning the illegal gun trade and Virginia's reaction to the problem are attached hereto as composite Exhibit B.

12. (a) In 1993, also while at *The Washington Post*, I authored several articles about the Government investigation into the Bureau of Alcohol, Tobacco and Firearms ("ATF")'s 1993 raid on the Branch Davidian compound in Waco, Texas. Four federal agents were killed and 16 others wounded during the raid. More than 80 Branch Davidians later died when the compound caught fire after the FBI injected tear gas inside. Much of the investigation concerned whether ATF proceeded with the raid despite bad intelligence, questionable tactics, and faulty decision-making. Then-ATF Director Stephen Higgins and several top-ranking officials were the focus.

(b) Many of these articles relied on information from confidential sources. Specifically, confidential Government sources questioned why ATF entered a heavily-armed compound in broad daylight. These sources revealed that Branch Davidian leader David Koresh knew the identity of a Government informant who had infiltrated the group, and that ATF commanders knew they had lost the element of surprise, but the raid nonetheless went forward. Confidential sources also revealed that the raid was planned less than a week before its execution, and the plan was not detailed in accordance with ATF guidelines. If I had no ability to promise confidentiality to these sources, they would not have

furnished vital information for these articles about the Government ineptitude that led to the deaths of its own employees and the people inside the Davidian compound.

(c) During the course of my reporting and that of others, an independent review panel concluded that ATF officials used a "pattern of deception" to try to conceal the problems with the raid, and that ATF knew that the Davidians learned of the mission prior to its launch, giving them time to prepare a counterattack. Director Higgins, and five senior officials, were removed from their jobs with the agency as a result.

(d) Copies of selected articles that I wrote or helped to write concerning the ATF raid at Waco and the ensuing investigation are attached hereto as composite Exhibit C.

13. (a) In 1995, in the wake of the bombing at the Alfred P. Murrah Federal Building in Oklahoma City that killed or injured more than 600 people, I wrote numerous articles for *The Washington Post* about the investigation into the identities of those responsible.

(b) Many of these articles relied heavily on confidential law enforcement officials. For example, some sources provided information that the Government quickly had ruled out a vast coordinated effort or wide-scale terrorist attack, while other sources questioned whether the prosecution had ruled out a broader conspiracy too soon and focused too narrowly on Timothy McVeigh and Terry Nichols. These sources indicated that there might have been several others involved in the bombing that the Government could not identify. If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government investigation to uncover and punish all of those responsible for the Oklahoma City bombing.

(c) My reporting and that of others was instrumental in helping a nervous public sort through the course of the Government investigation, overseeing what steps the Government was taking to bring those responsible to justice, how secure the public could be that the right people had been identified, and what efforts were being made to root out all of their accomplices.

(d) Copies of selected articles that I wrote or helped to write concerning the Government investigation in the aftermath of the Oklahoma City bombing are attached hereto as composite Exhibit D.

14. (a) Six years after Oklahoma City, when America experienced a large-scale terrorist attack, I was a reporter for ABC News. I along with my colleagues at ABC News received a Peabody Award for our coverage of the World Trade Center and Pentagon on September 11. Our efforts included coverage of the now infamous July 2001 "Phoenix Memo," an internal FBI warning memo about Islamic terrorists training at U.S. flight schools and the possible connection between these students and Osama Bin Laden. The memo, which went unheeded at the FBI, suggested a nationwide sweep of flight schools for possible terrorists. ABC News closely analyzed other pre-attack warnings as well.

(b) Many of the articles about the September 11, 2001 terrorist attack relied heavily on confidential Government sources. For example, confidential sources revealed that before the attack, FBI headquarters rewrote and weakened portions of an affidavit that the FBI's Minnesota field office had drafted in support of an application for a search warrant for records from Zacarias Moussaoui's computer. These sources complained the edits hindered the investigation after the application for the warrant was denied. Confidential government sources also revealed the National

Securitv Agency's failure to translate two intercepted Arabic telephone conversations the day before the attack which said "tomorrow is zero day" and "the match begins tomorrow." If I had no ability to promise confidentiality to these sources, they would not have furnished vital information for these articles about the Government investigation into what more might have been done to prevent the September 11 tragedy, and what may be done in the future to prevent it from happening again.

(c) My reporting, and that of my colleagues at ABC News, was instrumental in identifying and analyzing the uncoordinated manner in which federal law enforcement agencies received and processed intelligence information prior to the September 11. This reporting helped the public put into perspective the administration's creation of the Department of Homeland Security, one way in which the Government has attempted to improve, coordinate and consolidate functions of the federal agencies, in order to provide better intelligence.

(d) Copies of selected articles that I wrote or helped to write concerning the Government investigation into the September 11 attacks are attached hereto as composite Exhibit E.

15. In my deposition taken by Dr. Lee's lawyers in this matter, I tried to answer as truthfully and as fully as I could all questions that would not require me to breach promises I made to sources to keep their identities confidential. I engaged in far more discussion with Dr. Lee's counsel about my conversations with sources than I or most any other journalist would be comfortable doing. I did so to comply, as best I could without breaching my promises to sources, with the direction of this Court and with all due respect to Dr. Lee and his counsel.

16. I can provide no further information than that which I gave in my deposition without breaching promises to these sources. The promises were express conditions on which my interviews with these people were based. Had I not made the promises, these people would not have provided me the information. Further, if I were to breach my agreements with these sources, even under Court order, I could no longer function effectively and accurately in reporting on matters of public interest; as my reputation would become that of a journalist who might not keep his promise to a source.

17. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that this Court find that I have shown sufficient cause why I should not be held in contempt of court.

FURTHER AFFIANT SAYETH NOT.

/s/
Pierre G. Thomas

DISTRICT OF COLUMBIA

The foregoing instrument was acknowledged before me this 27th day of July, 2004, by Pierre G. Thomas, who is personally known to me or has produced a driver's license as identification.

Notary Commission Expires:

07/27/04
Date

/s/
Signature

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE, Plaintiff, v. UNITED STATES DEPARTMENT OF JUSTICE, et al., Defendants.	Civ. A. No. 99-3380 (TPJ)

DECLARATION OF WALTER PINCUS

I, Walter Pincus, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for The Washington Post. In 1999, 2000 and 2001, I authored or co-authored nearly 100 news articles reporting on security concerns at the Los Alamos National laboratory. A small number of those articles concerned the investigation, firing, prosecution and conviction of Wen Ho Lee. I submit this declaration in opposition to Mr. Lee's motion to compel me to identify the confidential sources who provided me with information concerning him that was reported in those articles.

2. I have worked as a journalist almost continuously since graduating from Yale University in 1954 – for the New York Times, the Wall Street Journal, the Washington Star, the New Republic, NBC News, CBS News and, for 35 years, The Washington Post. While working as a journalist, I have

also studied law, receiving my J. D. degree from the Georgetown University Law Center in 2001, and taught seminars on the oversight of government at Yale University and Stanford University's Washington program. I have been a member of the Council on Foreign Relations for more than 30 years.

3. Much of my work in journalism has been in the field of intelligence and national security. My non-journalistic experience has been in those areas as well. From 1955 to 1957, I served in the U.S. Army Counterintelligence Corps. In 1962-63, I directed an investigation into foreign government lobbying for the Senate Foreign Relations Committee under its then Chairman, Senator J. William Fulbright. In 1969-70, I directed an investigation for the same Committee into U.S. military and security commitments abroad and their effect on U.S. foreign policy. Both investigations led to legislation – the first to a revision of the Foreign Agents Registration Act; the second to a series of limiting amendments on defense appropriations bills that culminated in the Hatfield-McGovern legislation to end the Vietnam War.

4. In my reporting for The Washington Post and other news organizations, I have regularly found it necessary to rely upon information provided by confidential sources – individuals who agreed to speak with me only after being assured that their identities would not be revealed. In general, those individuals were providing information about activities within government that they believed the public had a right to know. Sometimes that information provided evidence of wrongdoing; sometimes it revealed facts that were embarrassing to those in power; and sometimes it provided insights into how governmental decisions were made or how current events affected the public interest. In all of these cases, factual information that I believed was of

vital interest to the public would not have been published if I had not promised to maintain the confidentiality of those individuals who were in a position to disclose it. Some examples of my reporting that depended upon information from confidential sources are set forth below.

5. In 1977, I wrote the first stories about the neutron warhead. Copies of those stories are attached to this Declaration as Exhibit A. Those stories, for which I received the George Polk Award, depended in good part on information provided by confidential sources. Ultimately, President Carter decided to defer production of neutron missiles and artillery shells, because the publicity generated by the published stories created public opposition at home and in Europe against those weapons.

6. For six years I covered the Iran-Contra affair. Some of my stores are attached as Exhibit B. In the course of my reporting on this matter, I published once-classified information that was provided by confidential sources. For example, I wrote one of the first stories confirming that secret shipments of arms were sent to Iran to obtain release of hostages at a time when administration officials were refusing to confirm that fact. I used confidential sources within the executive branch and on Capitol Hill, as well as foreign officials and private individuals, all of whom needed to be assured their names and in some cases their employment would not appear. My reporting and that of other reporters were instrumental, I believe, in prompting the appointment of an independent counsel.

7. In 1992, I co-wrote stories on the Bush administration's reviewing Presidential-candidate Bill Clinton's passport files. See Exhibit C. Again, these stories relied upon information provided by confidential sources. And again, these and other stories ultimately led to the appointment of an independent counsel.

8. I covered the case of confessed-spy Aldrich H. Ames and its aftermath. See Exhibit D. Much of my analysis of the significance of this case was based upon interviews with confidential sources inside and outside government who were familiar with the investigation and prosecution of the case.

9. My recent reporting has focused on the intelligence community, Osama bin Laden, terrorism and the war in Iraq. In 2000, I was awarded the first Stewart Alsop award for national security and intelligence reporting by the Association of Foreign Intelligence Officers. Some of the stories that led to that award are attached as Exhibit E. Many of those stories relied upon information provided by confidential sources.

10. In 2001, I shared a Pulitzer Prize for National Reporting with four other Post reporters for our stories about Osama bin Laden. Copies of my stories are attached as Exhibit F. Confidential sources provided critical information that contributed greatly to the overall impact of those stories.

11. Since late 2002, I have been writing about the intelligence community, weapons of mass destruction and Iraq – including the United Nations inspections. Again, confidential sources both inside and outside the U.S. government have been the foundation for this reporting. Some stories illustrating this coverage, which have been submitted in Pulitzer Prize entries for 2003, are attached as Exhibit G.

12. In my current reporting on the intelligence community, the Bush administration, terrorism and the war in Iraq, I rely constantly upon factual information and observations provided by intelligence professionals and other government and congressional experts who will speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity

to sources, I would be unable to cover these areas accurately and effectively. Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

13. In this case, Wen Ho Lee seeks to identify the confidential sources who provided information to me, which I checked as best I could to confirm accuracy, concerning official investigations underway into allegations of espionage in the nation's nuclear weapons laboratories. Over time, some of these stories dealt with his firing, prosecution and conviction for mishandling classified information.

I began covering the subject of alleged espionage at the laboratories in late January 1999. On February 17, 1999, The Post published an article under my byline entitled "U.S. Cracking Down on Chinese Designs on Nuclear Data." See Exhibit H. The article reported that U.S. intelligence analysts in the mid-1990s had discovered that Chinese nuclear designs were "uncomfortably similar" to those of the U.S. Trident missile warhead. That discovery, I reported, had by 1997 prompted a major FBI counterespionage investigation and raised "concerns about curtailing the traditional openness within the country's nuclear scientific circles." The article disclosed that the FBI investigation had begun with employees at the Los Alamos laboratory, where the Trident warhead had been designed, and that more than a year earlier had "c[o]me to focus on an Asian American scientist at Los Alamos who had contacts with the Chinese and has since been transferred to a job outside the national security area." The article did not identify this individual, although it was later disclosed that he was Wen Ho Lee. This article was based in large measure on interviews with individuals who insisted on anonymity. The public interest was served, I believe, by the publication of this article, and it would have been impossible for me to collect and report the information

contained in this article if I had not promised anonymity to those sources.

14. On March 9, 1999, The Post published an article under my byline entitled "Spy Suspect Fired at Los Alamos Lab."[1] See Exhibit I. That article reported that "Energy Secretary William Richardson had fired a Los Alamos National Laboratory weapons designer yesterday who was under suspicion of handing nuclear secrets to China in the late 1980s." This and other information in the article was provided by confidential sources to whom I promised anonymity. I believe that this article, too, was in the public interest, and it could not have been written if I had not assured anonymity to my sources.

15. On November 20, 1999, The Post published an article entitled "Fired Lab Scientist Can't Account for Some Disks," under the joint byline of Vernon Loeb and me. See Exhibit L. The article reported: "Former Los Alamos scientist Wen Ho Lee has told government investigators that he cannot account for several computer diskettes onto which he downloaded nuclear secrets, according to Clinton administration officials." While much of the specific information contained in this article was provided by confidential sources, FBI Director Louis J. Freeh was identified as having said that he expected Lee to be indicted for gross negligence in handling classified information. Lee was subsequently indicted for mishandling classified

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[1] Between the publication of my February 17 article and my March 9 article, at least two other news organizations also published articles concerning Lee. On March 6, 1999, the New York Times published an article under the byline of James Risen and Jeff Gerth entitled "Breach at Los Alamos: A Special Report; China Stole Nuclear Secrets for Bombs, U.S. Aides Say." A copy of that article is attached hereto as Exhibit J. On March 8, 1999, the Associated Press published a story by H. Josef Hebert entitled "Government Scientist Involved in Probe is Fired." A copy of that article is attached hereto as Exhibit K.

information, and he pled guilty to this charge, a felony, based on the facts set forth in this article. Copies of the grand jury indictment, as well as the press releases of the FBI and U.S. Attorney's Office concerning the indictment, are attached hereto at Exhibit M.

16. As part of his plea agreement with the United States, Wen Ho Lee was required to subject himself to questioning concerning his handling of classified information. On February 4, 2001, The Post published an article under my byline entitled "Interrogation of Lee Raises New Questions, Sources Say." See Exhibit N. That article began as follows:

> The FBI and Justice Department prosecutors are considering seeking court approval to further question former Los Alamos scientist Wen Ho Lee under oath because they are not satisfied with the answers he gave during 60 hours of questioning last November and December, according to sources close to the investigation.
>
> During the interrogation by FBI agents, Lee's answers raised new questions about his relationships with nuclear scientists from China and Taiwan, the sources said. He also has yet to provide a verifiable explanation of why he downloaded U.S. nuclear secrets to portable computer tapes while working at the Los Alamos National Laboratory and what he did with the tapes, the sources said.

To my knowledge, Mr. Lee never provided a verifiable explanation of why he downloaded those nuclear secrets and what he did with the tapes. It was in the public interest, I believe, for those facts to be known. Those facts and other information in this article were provided by confidential

sources, both inside and outside government, who spoke to me only upon the assurance that I would not identify them.

17. Before asserting my First Amendment privilege not to identify my confidential sources in this case, I reviewed the Second Amended Complaint, which purports to state Mr. Lee's claims for violation of the Privacy Act. That complaint does not allege that any disclosure contained in any of my four articles involved any violation of the Privacy Act. The Complaint makes no mention whatsoever of the February 17 and November 20, 1999 articles and, as explained below, its brief references to my other articles do not appear to state any claim for violation of the Privacy Act.

18. The Second Amended Complaint contains a passing reference to the March 9, 1999 article – specifically, the statement, attributed to "an official familiar with the investigation," that "[w]e are still trying to pin down exactly when information was passed." I do not understand how that statement could implicate any violation of the Privacy Act. As I explained in my deposition, that was not a statement about Mr. Lee. It was not a statement, in other words, to the effect that the government was trying to pin down when information was passed by Mr. Lee. It was simply a statement that the government was trying to pin down when information was passed to the Chinese – by anyone.

19. The Second Amended Complaint contains a single reference to my February 4, 2001 article, alleging as follows:

> Citing government "sources close to the investigation," the article reveals selective details of information provided by Dr. Lee to Defendants during the secret debriefings. Moreover, an unnamed "government official" falsely depicted Dr. Lee's responses as "evasive, confusing, and

> frustrating for the people conducting the interview."

The interview referred to in this passage from the Complaint is the questioning that Mr. Lee was required to undergo as a condition of his guilty plea. At this point, he was a convicted felon fulfilling the requirements of his plea agreement. It is difficult to conceive of the privacy interest that Mr. Lee could claim in such an interview, much less how he can claim to have suffered compensable damage from the release of information contained in that interview. Although he complains of the characterization of his responses as "evasive, confusing, and frustrating," he does not attempt to state a claim for defamation, nor can I imagine how he could do so.

20. It would be a disturbing application of the Privacy Act, in my view, if it were applied to prohibit the kind of factual, newsworthy disclosures contained in my articles about the possible disclosure of nuclear secrets to China or Taiwan and the investigation and conviction of Mr. Lee for mishandling classified information entrusted to him. But whether or not the Privacy Act can be applied to such disclosures, it is apparent for the reasons stated above that my articles are not the basis for the Second Amended Complaint.

21. It is also apparent that, for the most part, Mr. Lee's attorneys have not inquired about my articles in the depositions they have taken in this case. Before I invoked my First Amendment privilege at my deposition, I read all 20 of the depositions of non-journalists in the case. Only four of those 20 witnesses were asked about the sources for my February 1999 article; only six were asked about the sources for my March 1999 article; only one was asked about the sources for my November 1999 article; and only one was asked about the sources for my February 2001 article. In

short, although Mr. Lee's counsel asked me to identify the sources for each of these stories, they did not make any systematic effort to ask the other witnesses in the case whether they were sources, or could identify the sources, for any of the information in my articles.

22. I cannot identify my confidential sources for these articles without violating commitments that I made to those individuals to maintain their anonymity. Those commitments were a condition of my interviews with these individuals. If I had not promised them anonymity, they would not have provided the information I was able to report. If I were to breach my commitment to these sources, even under Court order, I could no longer function effectively and with accuracy in reporting on matters of intelligence and national security.

23. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that the Court deny Mr. Lee's motion to compel.

I declare under the penalty of perjury, this 11th day of March 2004, that the foregoing is true and correct.

/s/

Walter Pincus

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WEN HO LEE and SYLVIA LEE, Plaintiffs, - against – UNITED STATES DEPARTMENT OF JUSTICE, FEDERAL BUREAU OF INVESTIGATION, and UNITED STATES DEPARTMENT OF ENERGY, Defendants.	Civ. A. No. 1:99-3380 (TPJ)

AFFIDAVIT OF JEFF GERTH

DISTRICT OF COLUMBIA: ss :

JEFF GERTH, being first duly sworn, deposes and says:

1. I am a reporter for The New York Times ("The Times") and have worked for The Times as a journalist for more than twenty-five years. I submit this affidavit in support of the motion to quash a subpoena directed at me.

2. I am fully familiar with the facts set forth herein and make this affidavit based on my personal knowledge unless otherwise stated. The exhibits attached to this affidavit are true and accurate copies of the documents cited herein.

3. I have spent most of my career at The Times working as an investigative journalist on a wide variety of issues,

including organized crime, intelligence, government regulation, corporate affairs, and the financing of political candidates.

4. I have won numerous awards in connection with my investigative reporting. In 1999, I was awarded the Pulitzer Prize for my reporting about the transfer of American technology to China. This past year I shared the Pulitzer Prize along with other journalists at The Times for my coverage of the September 11, 2001 terrorist attacks. In 1981, I and two colleagues won the George Polk Award for my work concerning former United States intelligence agents working in Libya. In 1977, I and a colleague were awarded the Newspaper Guild's Front Page Award.

5. On March 6, 1999, The Times published an article written by my colleague James Risen and I entitled "Breach at Los Alamos, A special Report, China Stole Nuclear Secrets for Bombs, U.S. Aids Say." The article described suspected espionage that the government believed to have allowed the Chinese to steal nuclear secrets from an American Government laboratory and make significant advances in the miniaturization of China's nuclear bombs. The article indicated that there was a suspect in the espionage case but did not identify the subject by name. Attached hereto as Exhibit A is a copy of the March 6, 1999 article.

6. The March 6, 1999 story was written with the help of confidential sources with whom I had no personal contact. I do not know the identity of those confidential sources related to the parts of the March 6 story having anything to do with the unnamed suspect. Nor do I know what federal government agencies they may or may not have worked for at the time Mr. Risen and I wrote the March 6 story.

7. On April 28, 1999, Mr. Risen and I co-wrote another article published in The Times entitled "U.S. Says Suspect Put Code On Bombs In Unsecure Files." The article reported

that the government suspected one of the plaintiffs, in this case Wen Ho Lee, of spying for China and of having improperly transferred huge amounts of secret data from a computer system at a Government laboratory potentially compromising the United States' nuclear arsenal. Attached hereto as Exhibit B is a copy of the April 28, 1999 article.

8. Like the earlier article that I co-authored with Mr. Risen, the April 28, 1999 story was written with the help of confidential sources. I do not know the identity of those confidential sources. Other than the information that is listed in the April 28 story itself, I have no information about what federal government agencies the confidential sources may or may not have worked for at the time Mr. Risen and I wrote the April 28 story.

9. I have been informed that the plaintiffs in this case allege in their Second Amended Complaint that the March 6 and April 28, 1999 stories were both based on "illegal leaks" of private information from United States government officials to The Times.

10. I have further been informed that the March 6 and April 28, 1999 articles are the only articles of mine that plaintiffs claim have anything to do with this case.

11. In late August, I received a letter from Heather Hersh Gilhooly, counsel for plaintiffs in this case, attaching a subpoena seeking my deposition testimony and the production of various documents related to my reporting of the stories about Wen Ho Lee for The Times. A copy of the letter from Ms. Gilhooly and the attached subpoena is attached hereto as Exhibit C.

12. I have reviewed the document requests attached to the subpoena and have conferred with counsel about their substance. I do not have any documents in my possession, custody or control that are responsive to the subpoena.

13. I have been informed that plaintiffs' counsel has advised my counsel that they expect to ask me questions asking me to identify the agencies that the confidential source or sources for the March 6 and April 28, 1999 articles I co-wrote with Mr. Risen worked for. As stated above, I cannot identify which agency or agencies the source(s) worked for. Any assistance I could render in doing so would in my view compromise to a significant degree my ability to continue reporting as well as the ability of other journalists to do so.

14. Based on my years of experience as a journalist, I firmly believe that compelling reporters to testify about conversations with and/or the identity of confidential sources would seriously impede all reporter's ability to gather and report the news. That is certainly true of me. Many of the stories that I have written have been based on confidential sources. Without confidential sources, it would be nearly impossible to do effective investigative reporting.

15. Compelling journalists to testify about their conversations with confidential sources will inevitably hinder future attempts to obtain cooperation from those or other confidential sources. It creates the inevitable appearance that journalists either are or can be readily converted into an investigative arm of either the government or of civil litigants. This would seriously compromise journalists' integrity and independence qualities that are essential to our ability to gain the trust of potential news sources and to effectively investigate and report on newsworthy events. Persons who would otherwise be willing to speak to me would surely refuse to do so if they perceived me to be not a journalist who keeps his word when he promises confidentiality but one who would break it in the interest of a civil litigant.

16. If court orders compelling reporters' testimony about confidential sources in cases such as this were easily obtained, news organizations and reporters would be chilled in their reporting of news matters vital to the public. Reporters and editors might decide to eliminate from news reports references to sources or other information likely to attract subpoenas. In some cases, the press might well choose to avoid certain controversial stories altogether.

17. In addition, compelling testimony of journalists about interactions with confidential sources would make the promises journalists make to such sources meaningless. I take such promises very seriously. I cannot break them.

18. Compelling testimony of journalists about interactions with confidential sources is particularly offensive in instances such as this one where it is clear that the plaintiffs have not exhausted all alternative sources of information. Specifically, I understand that the plaintiffs have not done everything within their power to get information from the government about the sources of any leaks to The Times concerning Wen Ho Lee.

19. I respectfully urge the Court to quash the subpoena.

/s/
Jeff Gerth

Sworn to before me this
23 day of September, 2002

/s/
Notary Public

Commission Expires: 1 March 2003

B39

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

In re Special Proceeding	)	Misc.
	)	01-47T

AFFIDAVIT OF JAMES TARICANI

State of Rhode Island)
) ss.
County of Providence)

James Taricani, being duly sworn, says:

1. I am an investigative reporter for WJAR, a television station that is owned and operated by the National Broadcasting Company, Inc. WJAR serves Providence and Rhode Island and is the leading television station in the market. I have worked as a professional journalist for 28 years in Rhode Island.

2. In my capacity as the lead investigative reporter for WJAR, I have reported on the Operation Plunder Dome investigation and the corruption trial of Mayor "Buddy" Cianci and co-defendants. In the course of my investigation, I obtained a videotape containing hidden camera footage showing an alleged bribe being paid to defendant Frank Corrente by Antonio Freitas, a government witness. On February 2001, WJAR broadcast a news report concerning Operation Plunder Dome that featured excerpts from the videotape, as part of its 11:00 p.m. newscast.

3. The source who provided me the videotape did so only upon obtaining my assurance that I would protect the confidentiality of the identity of the source.

4. On July 15, 2002, I appeared for a deposition before Special Prosecutor Marc DeSisto. I refused to answer questions that would have required me to reveal information about my newsgathering practices and that could lead to the discovery of the identity of my confidential source.

5. In the course of my 28-year career in journalism, I have relied on confidential sources to report more than one hundred stories, on diverse issues of public concern such as public corruption, sexual abuse by clergy, organized crime, misuse of taxpayers' money, and ethical shortcomings of a Chief Justice of the Rhode Island Supreme Court. I have scrupulously maintained the confidentiality of these sources and have never disclosed the identity of a confidential source to anyone other than another colleague working with me on the same story.

6. My ability to offer confidentiality to sources and to maintain their confidentiality has been indispensable to my ability to report important matters of public interest. Without a promise of confidentiality, many of my sources would not have come forward and provided valuable information. Some of the wrongdoing my stories have disclosed would never have come to light if I were not able to provide a meaningful promise of confidentiality to sources.

7. For example, in the early 1980's, I conducted a six-month investigation into the dumping of toxic waste in Rhode Island landfills. I reported that carting companies from New Jersey, supported by organized crime, were illegally dumping material in Rhode Island, with the support of organized crime in Rhode Island. This report sparked a state grand jury investigation and several civil lawsuits. I relied on several confidential sources to report this story. I

could not have uncovered this unlawful activity without obtaining information under the promise of confidentiality. Some of my sources feared that their physical safety could be threatened if it were known that they provided me information.

8. A confidential source was also central to my investigation in the 1980's into the Laborer's International Union of North America and its misuse of union dues. I believe the public attention provoked by my reports helped lead to the eventual indictment of the union's president and reputed mafia boss, Raymond Patriarca. I could not have reported this story without the participation of my confidential source. That source provided me information despite the source's belief that doing so constituted a threat to the source's life.

9. I have received four Emmy awards and ten Emmy nominations for my reporting. I have also received more than two dozen awards for investigative reporting from the Associated Press. In 1996, I won the prestigious Edward R. Murrow award from the Radio and Television News Directors Association. I received this award for my report concerning strip clubs in Providence and campaign contributions made to Mayor Cianci. Confidential sources played a critical role in the reporting of that story.

10. In 1996, I was inducted into the Rhode Island Heritage Hall of Fame for, as the citation stated, "serving the Rhode Island community by his reporting on government corruption, organized crime and health issues that affected the entire state." Maintaining a promise of confidentiality is critical to my ability to continue to gather news and report on these kinds of stories.

11. If compelled by the Court to disclose the identity of a confidential source, my ability to gather news and information from confidential sources, and report it to the

public, will be seriously undermined. Sources will fear that I cannot guarantee my promise of confidentiality. Many of my confidential sources have provided information at risk to their safety, livelihood and well-being. I have no doubt that sources will not be willing to come forward absent a meaningful promise of confidentiality or with the risk that this promise can be compromised. The loss of confidential sources will necessarily and substantially reduce the quantity, and quality, of important news available to the public about issues of widespread concern.

/s/
James Taricani

Subscribed and sworn to
this 6th day of September, 2002.

/s/
Notary Public

B43

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
v.	)	
	)	
ATTORNEY GENERAL JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF BRIAN ROSS

I, Brian Ross, hereby declare under the penalty of perjury as follows:

1. I am the Chief Investigative Correspondent for ABC News in New York. My reports are regularly broadcast on such television programs as *20/20, Primetime Live, Nightline, World News Tonight with Peter Jennings* and *Good Morning America*. My reporting has earned a number of major awards for outstanding investigative journalism in broadcasting, including five DuPont awards presented by Columbia University, four Peabody awards and ten Emmy awards. Between 2001 and 2004, I regularly presented news reports on the federal investigation of the anthrax terror attacks that killed five people and led to the closing of the United States Capitol for the first time in recent history. Where events warranted, those reports concerned, among other matters, the investigation of Dr. Steven Hatfill as a "person of interest" in the anthrax investigation. Several of

those broadcasts are referenced in a subpoena issued to ABC News, by which Dr. Hatfill evidently seeks the identification of confidential sources who provided me with information for those reports. A copy of the subpoena is attached hereto as Exhibit A. I submit this declaration in support of a motion to quash Dr. Hatfill's subpoena.

2. I have worked as a journalist since graduating from the University of Iowa in 1971. I began my career as a network correspondent in 1976 with NBC News, where I worked until 1994. I have been the Chief Investigative Correspondent for ABC News since that time.

3. In my investigative reporting for NBC News, ABC News and other news organizations, I have regularly found it necessary to rely upon information provided by confidential sources – individuals who agreed to speak with me only after being assured that their identities would not be revealed. Whether exposing wrongdoing, revealing facts embarrassing to those in power, or providing insight into governmental decision-making, these sources all relied upon my guarantee of confidentiality to bring into the open information they believed the public had a right to know. In all of these cases, factual information of significance to the public would not have been brought into the public domain had I not promised to maintain in confidence the identity of those who provided the information. Some examples of my reporting that depended upon information from confidential sources are set forth below.

4. In the 1970's and 1980's, my reporting included stories on the Mafia domination of American labor unions, failures in the federal government's war on drugs, criminal activities of the Bank of Credit and Commerce International ("BCCI"), attempts by Saddam Hussein to acquire materials to build a nuclear weapon, and illegal child labor used by the Walmart corporation in Bangladesh. In each of these reports,

I relied extensively on information obtained from confidential sources in the federal government and elsewhere, without whom I could not have brought these stories to light.

5. Since joining ABC News in 1994, I have relied on confidential sources to report huge flaws in the FBI's crime laboratory, the sale of prisoners' kidneys by the People's Republic of China, a corruption scandal that led to the indictment of the Governor of Illinois, and the unchecked influence of large corporations in federal political campaigns. Each of these stories was based on information obtained from confidential sources, without whom these reports simply would not have been possible.

6. Since September 11, 2001, I have been one of the primary reporters on terrorism for ABC News. Shortly after the attacks of 9/11, I was the first journalist to report on the FBI's failure to pursue leads regarding Zacarias Moussaoui, the reputed "20th hijacker." Transcripts of some of my reports on that topic are attached to this Declaration as Exhibit B. These reports depended in large measure on information provided by confidential sources, without whom I would have been unable to discover and report that the FBI had Moussaoui in custody several weeks before the 9/11 attacks. I believe that these reports and others helped lead to the establishment of the President's 9/11 Commission.

7. Also in September, 2001, I was one of the first reporters to publicly identify Mohammed Atta and describe him as the ringleader of the World Trade Center and Pentagon attacks. Transcripts of these broadcasts are attached as Exhibit C. For these reports, I again relied extensively on confidential sources, without whom I would have been unable to inform the public on events of great importance.

8. For the last three years I have continued to investigate and report on the intelligence failures of the United States government prior to the 9/11 attacks. For these reports, I again drew heavily on information provided by confidential sources. Absent the information provided by these sources, I could not have reported these stories.

9. In my current reporting on terrorism and the war in Iraq, I rely constantly on factual information and observations provided by intelligence and law enforcement professionals, and other government and congressional experts, who speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity to sources, my ability to report on these subjects accurately and effectively would be greatly diminished if not destroyed entirely. Knowledgeable individuals would be reluctant to discuss sensitive matters with me for fear that their identities may one day be revealed. Inevitably, the American public would receive less information on critical issues related to the performance of their government.

10. In this case, Dr. Hatfill seeks to identify the confidential sources who provided me with information concerning the massive federal investigation into the anthrax terror attacks – one of the largest investigations in FBI history. This story, much like the investigation, is ongoing, and I am continuing to gather information and deliver reports as events warrant.

11. I began covering the subject of the anthrax attacks in October, 2001, with the first reports of a death in Florida. As the investigation progressed, I learned and reported that Dr. Hatfill was under investigation in connection with the anthrax attacks. The June 25, 2002 *World News Tonight* broadcast include my report that FBI agents had executed a

search warrant at Dr. Hatfill's apartment. See Exhibit D. That report disclosed that the FBI had come to regard Dr. Hatfill as a "person of interest" in its investigation. My report was based in large measure on interviews with individuals who insisted on anonymity. I believe that the public interest was served by the disclosure that the FBI had a lead in the anthrax case. At that time, many Americans believed that foreign agents working for Iraq may have been responsible for the anthrax attacks. The information in my June 25, 2002 report revealed that the FBI was focusing much of its attention on an *American* suspect, not a foreign agent. The report was based largely on information obtained from confidential sources on the express condition that I would not reveal their names.

12. On the June 26, 2002 *Good Morning America* program, I again reported that Dr. Hatfill was a person of interest in the investigation. See Exhibit E. I also reported that there was circumstantial evidence potentially linking Dr. Hatfill to the case, including the fact that he had once lived near an elementary school in the town of Greendale, Zimbabwe (a name similar to the "Greendale School" used on the return address for the anthrax letters). Here again, my reporting depended largely upon confidential sources to whom I promised anonymity. I believe that this report, too, was in the public interest.

13. On the June 27, 2002 *World News Tonight* program, I reported that the government was investigating whether there might be a connection between the anthrax attacks and a government report, written before the attacks, which described how an attack might hypothetically be carried out. The government report contained many details that were consistent with the events that ultimately occurred. See Exhibit F. As I reported, ABC News obtained a copy of the government report, which accurately predicted that an

anthrax attack could be sent through the mail, containing 2.5 grams of contaminated powder with one trillion anthrax spores per gram of powder. On that same broadcast, I also disclosed that the government report was written for Dr. Hatfill, and that former colleagues of Dr. Hatfill said that he received the anthrax vaccine and had access to a supply of anthrax while working as a government scientist. I believe that this information was of significant importance to a public still deeply troubled by these attacks and eager to know whether the authorities had made any progress in their investigation. Once again, were it not for promises of confidentiality, much of this information would have been unavailable to me and to ABC News' audience.

14. On August 11 and 12, 2002, I again appeared on *World News Tonight*, this time to report about Dr. Hatfill's public declaration of his own innocence. See Exhibits G & H. On those broadcasts, Dr. Hatfill was shown responding to the government's investigation, and stating that he had nothing to do with the mailing of the anthrax letters. I, in turn, reported that Dr. Hatfill remained a person of interest to investigators, in part because of information suggesting he had a motive for the attacks, and in part because of the reaction of bloodhounds to the scent at his apartment. Dr. Hatfill's denials notwithstanding, he remained, at that time, the focus of the government's investigation, and therefore at the center of a story that continued to capture the public's attention. Here again, the strength and accuracy of my reporting depended largely on anonymous sources who insisted that I not disclose their identity.

15. On October 22 and 23, 2002, I appeared on *World News Tonight* again to provide more details about the use of bloodhounds in the investigation of Dr. Hatfill. See Exhibits I & J. In these broadcasts (the latter report was substantially the same as my report from the previous night), I reported

that the FBI considered the reaction of the bloodhounds to Dr. Hatfill's scent to be an important piece of evidence. I also reported that investigators had gathered information on Dr. Hatfill's activities while in Africa in the late 1970s and 80s, a time period in which he claimed to have served with a Rhodesian military unit that had been accused of using anthrax and other biological agents against opponents of white minority rule. These broadcasts, too, relied extensively on confidential sources, who told me that the FBI was building a "growing case of circumstantial evidence" against Dr. Hatfill. Had I not made promises of confidentiality to my sources, my ability to report on these newsworthy matters would have been greatly compromised.

16. On June 9 and 10, 2003, I appeared, respectively, on the *World News Tonight* and *Good Morning America* programs to report on the draining of a Maryland pond suspected of containing evidence relevant to the anthrax investigation. See Exhibits K & L. As I reported on those occasions, the pond was being drained at significant public expense and inconvenience over a period of several weeks. My report sought to address the reasons for this government action, which, as my confidential sources told me, was related to the FBI's "working theory" that Dr. Hatfill used makeshift lab equipment to place anthrax into envelopes, and then dumped the lab equipment into the pond. I also reported that the FBI's continuing interest in Dr. Hatfill was buffeted, in part, by his alleged presence in Florida around the time that an anthrax letter was sent to a media company in that State, and by his apparent possession of the powerful antibiotic Cipro at the time of the anthrax attacks.[1] Once again, much of the information in my report – which, I

[1] Dr. Hatfill's subpoena also references a second transcript from the July 10, 2003 broadcast of Good Morning America. A copy of that transcript is attached as Exhibit M.

believe, served the public interest – only became available to me after I made promises of confidentiality to my sources.

17. Finally, on July 20, 2004, I appeared on *World News Tonight* to report on a change in the investigation's focus. See Exhibit N. As I reported that night, confidential sources informed me that lab tests had shown that the anthrax used in the attacks had been developed in the U.S. Army's weapons lab at Ft. Detrick, Maryland. As a consequence of that finding – which came nearly three years after the attacks, and with the perpetrator still at large – the FBI sent more than twenty agents to Ft. Detrick to pursue this lead in the anthrax investigation. I believe that the public had a right to know that the investigation into these attacks had taken a new turn, and I sought out information that would enable me to explain these events and their significance to ABC's audience. Here again, just as I have throughout my career, I learned significant pieces of information for that report from sources who would only discuss the investigation on condition of complete anonymity. My ability to maintain the confidence of those sources is absolutely critical to my ability to continue reporting about developments in the anthrax investigation.

18. I cannot identify my confidential sources for these reports without violating my commitments to them that I would maintain their anonymity. Those commitments were a condition of my interviews with these individuals. If I had not promised them anonymity, they would not have provided the information I was able to report. If I were to breach my promise to these sources, even under Court order, I fear that I would be branded as someone who does not keep his word, and – as a result – the kind of enterprise reporting I have pursued over the course of my 30-year career as a journalist would no longer be possible.

19. For these reasons, more fully explained in the legal memorandum submitted on my behalf, I respectfully request that the Court quash Dr. Hatfill's subpoena.

I declare under the penalty of perjury, this 2nd day of February, 2005, that the foregoing is true and correct.

/s/
Brian Ross

B52

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
	)	
	)	
ATTORNEY GENERAL	)	
JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF DANIEL KLAIDMAN

I, Daniel Klaidman, hereby declare under the penalty of perjury as follows:

1. I am the Washington Bureau Chief for *Newsweek*, a weekly newsmagazine published by Newsweek, Inc. ("Newsweek"). In 2002 and 2003, I authored or co-authored a number of articles reporting on the federal investigation into the anthrax attacks of 2001. Two are referenced in a subpoena that Dr. Steven Hatfill served on Newsweek in connection with his Privacy Act case against the government. A copy of the subpoena is attached hereto as Exhibit A. I understand that Dr. Hatfill is seeking, among other things, the identities of any confidential sources that provided me and/or my co-authors with information for those articles. I submit this declaration in support of the motion to quash Dr. Hatfill's subpoena filed by the Washington Post, Newsweek, and the American Broadcasting Companies, Inc.

2. Upon graduating from Georgetown University in 1986, I began my career as a reporter for Legal Times, where I remained for eight years. I have worked as a reporter and/or Bureau Chief for Newsweek since 1996.

3. Of late, much of my reporting has been focused on terrorism and national security, but in years past much of my work focused on the Department of Justice.

4. In the course of my reporting for Newsweek and Legal Times, I have frequently relied upon information received from individuals in the government who agreed to speak with me only after being assured that their identities would be kept in complete confidence. These sources possessed information that they, and I, believed the public had a right to know. For a variety of reasons, however, they were unwilling to provide that information for attribution by name. The information that these sources possessed was often invaluable in explaining governmental actions and informing the public about the status of investigations and other matters in which the public had a vital interest. In such cases, I have not hesitated to promise, as a condition of receiving the information, that the source's identity will be kept confidential. Some examples of my reporting that depended upon information from confidential sources are set forth below.

5. In 1995, I reported on the stand-off and deadly FBI assault at Ruby Ridge. *See, e.g.*, Exhibit B. Critical to my account was the acquisition of a confidential report, written by the Department of Justice, from which I obtained evidence of the cover-up of the circumstances of the deadly assault. That report, and other supporting information I gathered, was only made available to me on the condition that I retain my source's anonymity. The publication of the information provided by this confidential source generated public and

official attention and helped spark a Congressional investigation of the Ruby Ridge episode.

6. In 1997, I wrote an article on the serious, and all too frequent, mistakes made by forensic experts at the FBI's vaunted crime laboratory. A copy of that story is attached to this Declaration as Exhibit C. Deeply embarrassing to the Bureau, and especially to then-Director Louis Freeh, the information at the heart of the article was only available to me because I made unequivocal and indelible promises of confidentiality. In part because of my articles and others, the FBI made significant reforms in the operation of its laboratories. I would have been unable to write the article were it not for the promises of confidentiality made to my sources.

7. During the 1990s, I authored several articles, published by Newsweek, that were deeply embarrassing to the Clinton Administration – including coverage of the Monica Lewinsky scandal, Paula Jones's sexual harassment lawsuit against the President, and the Democratic party's campaign finance scandal. *See, e.g.*, Exhibit D. Some of those articles also revealed information on the conduct of the Whitewater Independent Counsel's investigation that resulted in public criticism of that office. I believe that these articles served the public interest by promoting accountability and ethics in government. It is also my firm conviction that absent an assurance of confidentiality to my sources, I would not have been able successfully to report on matters of such sensitivity to a sitting President.

8. In 1997, I wrote several articles for Newsweek on the efforts of China to influence domestic politics. *See, e.g.*, Exhibit E. Those articles revealed, among other things, that the Chinese government secretly financed a California state politician's electoral campaigns. Much of the information contained in those articles came from interviews with

confidential sources who were unable publicly to disclose matters that were highly sensitive both to our government and that of a foreign nation.

9. My recent reporting has focused, in large measure, on terrorism, and the United States' efforts to combat it. In my capacity as Washington Bureau Chief, I oversaw Newsweek's award-wining coverage of September 11th, 2001, and its aftermath. I also co-authored several cover stories, including *The Hijackers We Let Escape*, published on June 10, 2002, which revealed the intelligence community's failure to share information about two 9/11 terrorists who had been living in the country for a year and a half before participating in the attacks, and *The Enemy Within*, published on June 23, 2003, which detailed how Al Qaeda was recruiting new members within the United States and planning to conduct additional attacks throughout the country. *See* Exhibit F. Those articles, which covered issues of manifest public importance, could not have been published without confidential sources.

10. More recently, I broke the story of White House Counsel Alberto Gonzales's central role in the creation of the White House's policy on interrogation of detainees—a policy that continues to be the focus of public controversy in this country and abroad. *See* Exhibit G. I never would have been able to bring this story to the public's attention without promising confidentiality to my sources.

11. In my current reporting on terrorism and other subjects, I continue to rely heavily upon the ability to obtain information through assurances of confidentiality made to members of the intelligence and law enforcement communities. Were I to breach a promise of confidentiality and identify any one of my sources, or were I in the future unable to assure anonymity to new sources, I would be unable to cover these areas accurately and effectively.

Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

12. In this case, Dr. Hatfill seeks to identify the confidential sources who provided information for use in three news stories published by Newsweek. As Washington Bureau Chief, I was involved in Newsweek's coverage of the anthrax attacks from the beginning, both as a supervisor of other reporters' work, and as a reporter in my own right. Mark Miller and I co-authored an article entitled, *The Hunt for the Anthrax Killer*, that was published in the August 12, 2002, edition of Newsweek.[1] *See* Exhibit H. The article described the animated response of FBI bloodhounds—which had first been presented with "scent packs" from the anthrax letters sent to Senators Tom Daschle and Patrick Leahy—upon arriving at Dr. Hatfill's apartment. The bloodhounds had similar reactions at two other locations known to have been frequented by Dr. Hatfill. As we explained in the article, the reaction of those bloodhounds figured prominently among the FBI's reasons for continuing to regard Dr. Hatfill as a "person of interest" to the investigation.[2] The information contained in that article came from interviews with knowledgeable persons who insisted on complete anonymity. Had we not agreed to that condition, we could not have written the article. I believe that the public interest was served by my having made that promise and disclosed to the public the progress that the FBI believed it was making towards solving this notorious crime.

---

[1] Mr. Miller is no longer a Newsweek employee, but Dr. Hatfill's subpoena to Newsweek does make reference to an article written by Mr. Miller and published on the Internet on August 12, 2002. Mr. Miller relied on confidential sources for that article, a copy of which is attached hereto as Exhibit I.

[2] Attorney General John Ashcroft publicly identified Dr. Hatfill as a "person of interest" in the investigation on August 6, 2002.

13. In its May 26, 2003, edition, Newsweek published an additional article mentioning Dr. Hatfill, this time co-authored by Michael Isikoff and me. *See* Exhibit J. Entitled *Finally the FBI Uncovers A Tantalizing Clue*, that article reported that, acting on a tip, FBI divers had recovered a plastic container from a Maryland pond, and that some investigators believed it could have been used in the anthrax attacks. While that information had previously been reported by the Washington Post, among others, it was supplemented by information provided by confidential sources who told us that some investigators were taking the theory seriously, but others had dismissed it as fantasy. On the basis of other information obtained from confidential sources, we were able to report that the investigators were first led to the Maryland pond by a tip given by a friend of Dr. Hatfill's. According to our sources, that friend told the FBI about a conversation in which Dr. Hatfill suggested that the anthrax could have been made in the woods and the evidence tossed "in a lake." These reports added significant dimensions to the public's understanding of the anthrax investigation. But for our promises of confidentiality, that information could not have been uncovered and reported.

14. If Newsweek or I were to identify the confidential sources for Newsweek's reporting on the anthrax investigation, that would be in violation of firm commitments to those sources, without which the information would not have been provided. If Newsweek or I were to breach the commitments that were made to those sources, even under Court order, our ability to report effectively on matters of legitimate public interest would be seriously undermined.

15. For those reasons and others, more fully explained in the legal memorandum submitted on Newsweek's behalf, I respectfully request that the Court quash Dr. Hatfill's subpoena to Newsweek.

I declare under the penalty of perjury, this 28th day of January, 2005 that the foregoing is true and correct.

/s/
Daniel Klaidman

B59

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STEVEN J. HATFILL, M.D.,	)	
	)	
Plaintiff,	)	Case No.
	)	1:03-CV-01793
	)	(RBW)
	)	
	)	
ATTORNEY GENERAL	)	
JOHN ASHCROFT, et al.,	)	
	)	
Defendants.	)	
	)	

DECLARATION OF ALLAN LENGEL

I, Alan Lengel, hereby declare under the penalty of perjury as follows:

1. I am a staff writer for The Washington Post. Since October 2001, I have authored or co-authored a number of news articles reporting on the anthrax attacks, their aftermath, and the ensuing criminal investigation. Several of those articles concerned Dr. Steven Hatfill, whom the Attorney General has described as a "person of interest" in the investigation. I submit this declaration in support of The Washington Post's motion to quash Dr. Hatfill's subpoena, which evidently seeks to identify confidential sources who provided information to The Post concerning him. A copy of the subpoena is attached hereto as Exhibit A.

2. I have worked almost continuously as a journalist since 1977 for, among others, The Oregonian, The Detroit

News and, since March 1997, The Washington Post. During that time, I have also written freelance articles for The New York Times and Bloomberg News. I have also worked as a freelance reporter for Newsweek.

3. In my reporting for The Washington Post and other news organizations, I have sometimes found it necessary to rely upon information provided by confidential sources—individuals who agreed to speak with me only after being assured that their identities would not be revealed. In general, those individuals were providing information about activities within government that they believed the public had a right to know. Sometimes that information provided evidence of wrongdoing; sometimes it revealed facts that were embarrassing to those in power; and sometimes it provided insights into how governmental decisions were made or how current events affected the public interest. In all of these cases, factual information that I believed was of vital interest to the public would not have been published if I had not promised to maintain the confidentiality of those individuals who were in a position to disclose it.

4. Since February 2001, I have been writing articles about federal and local law enforcement in the Washington metropolitan area. In my current reporting on local law enforcement, I rely constantly upon factual information and observations provided by law enforcement sources who will speak only upon the condition of complete anonymity. If I were to breach a promise of confidentiality to any of my confidential sources, or if in the future I were unable to assure anonymity to sources, I would essentially be unable to cover these areas accurately and effectively. Knowledgeable individuals would either not discuss matters or would only say what is already on the public record, whether it was accurate or not.

5. In this case, Stevens Hatfill is seeking "information obtained regarding governmental investigation of whether Steven J. Hatfill, M.D. had any connection with the 2001 mailings of anthrax through the U.S. mail," including information contained in four articles that I wrote or co-authored. Dr. Hatfill is apparently seeking, among other things, to identify the confidential sources who provided information for these articles.

6. On January 25, 2003, The Post published an article that I wrote entitled "Hunt for Clues in Anthrax Case Revived: FBI Agents Return to Frederick Forest in Search Reportedly Linked to Scientist." See Exhibit B. The article reported that "[t]he FBI has again returned to a forested area in Frederick to search for clues in the anthrax killings case." The article further reported that the search was tied to Steven Hatfill, and that it was "triggered by a hypothetical statement Hatfill had made about anthrax." I believe the public interest was served by the publication of this article. It would have been impossible for me to collect and report the information contained in this article if I had not promised anonymity to my sources.

7. On August 1, 20003, The Post published an article that I wrote with Washington Post staff writer Guy Gugliotta entitled, "Md. Pond Produces No Anthrax Microbes; FBI Sought Clues in Deadly Attacks." See Exhibit C. The article reported that "lab tests of soil samples taken from a Frederick pond that the FBI drained in June showed no traces of anthrax bacteria." The article was based in large part on interviews with individuals who insisted on anonymity. Again, the public interest was served, I believe, by the publication of this article, and it would have been impossible for me to write the article if I had not promised anonymity to important sources.

8. On March 30, 2004, The Post published an article that Carol Leonnig and I wrote entitled "Judge Delays Lawsuit To

Help Anthrax Probe." See Exhibit D. The article reported that "[I]nvestigators have narrowed the likely source [of the anthrax] to a short list of labs, including Fort Detrick, the Dugway Proving Ground in Utah, and Louisiana State University." It also reported that "Hatfill continues to be a key focus of the probe," but that some law enforcement sources "doubt that the team of 25 agents and 12 postal inspectors will find the evidence to make the case against anyone." This information was provided by confidential sources, and it was in the public interest, I believe, for this information to be known.

9. On July 18, 2004, The Post published an article that I wrote entitled "Anthrax Probers Still Seek Md. Leads; Investigators Keep Returning to Frederick." See Exhibit E. The article provided an update on the anthrax investigation and its continuing focus at least in part on the Frederick area. It was based in part on information obtained from confidential sources. I believe that this article, too, was in the public interest. Much of it could not have been written if I had not assured anonymity to my sources.

10. In addition to the articles discussed above, Dr. Hatfill's subpoena makes reference to three other Post articles: (a) an article, dated May 11, 2003, by Marilyn Thompson[1] and entitled *New Find Reignites Anthrax Probe* (Exhibit F); (b) an article, dated June 10, 2003, by David Snyder and Marilyn Thompson and entitled *Md. Pond Drained for Clues in Anthrax Probe* (Exhibit G); and (c) an article, dated September 14, 2003, by Marilyn Thompson and entitled *The Pursuit of Steven Hatfill* (Exhibit H). I contributed to each of these articles, and I understand that they were based in part on information provided by confidential sources.

---

[1] Marilyn Thompson is no longer a Post employee.

11. If The Post or I were to identify the confidential sources for The Post's reporting on the anthrax investigation, that would be in violation of firm commitments to those sources, without which the information would not have been provided. If The Post or I were to breach the commitments that were made to those sources, even under Court order, our ability to report effectively on matters of legitimate public interest would be seriously undermined.

12. For these reasons, more fully explained in the legal memorandum submitted on The Post's behalf, I respectfully request that the Court grant The Post's motion to quash.

I declare under the penalty of perjury, this 27th day of January 2005, that the foregoing is true and correct.

/s/
Allan Lengel

Nos. 04-1507 & 04-1508

Supreme Court, U.S.
FILED
MAY 18 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JUDITH MILLER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

MATTHEW COOPER AND TIME INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF AMERICAN SOCIETY OF NEWSPAPER EDITORS; BLOOMBERG NEWS; THE COPLEY PRESS, INC.; COX NEWSPAPERS, INC.; DAILY NEWS, L.P.; THE E.W. SCRIPPS COMPANY; FOX NEWS NETWORK, L.L.C.; KNIGHT RIDDER; THE MCCLATCHY COMPANY; THE MCGRAW-HILL COMPANIES, INC.; NATIONAL ASSOCIATION OF BROADCASTERS; NEWSPAPER ASSOCIATION OF AMERICA; NEW YORK PRESS CLUB; NYP HOLDINGS, INC.; RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION; REPORTERS WITHOUT BORDERS; REUTERS AMERICA LLC; AND WHITE HOUSE CORRESPONDENTS' ASSOCIATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici are eighteen newsgathering organizations, media organizations, and reporters' groups from across the country, many of which employ and represent thousands of reporters like the Petitioners in this case.[1] As members of the press, *amici* represent what this Court has called the "constitutionally chosen means for keeping officials elected by the people responsible to all the people whom they were selected to serve." *Mills v. Alabama*, 384 U.S. 214, 219 (1966). *Amici* take this public responsibility seriously and thus have a strong interest in ensuring that the press retains its historic role as "a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences." *Estes v. Texas*, 381 U.S. 532, 539 (1965).

The press's ability to play its crucial role in our society depends in part on its capacity to gather valuable information from sources who demand assurances of anonymity. The Court of Appeals affirmed rulings holding journalists and a publisher in contempt of court for honoring promises to protect the identities of their confidential sources. That decision is in conflict with decisions from other circuits that recognize constitutional or common law privileges protecting reporters from compelled disclosure of confidential information. These inconsistent rulings create confusion

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[1] A complete list of *amici* is set out in the Appendix. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amici* or their counsel, contributed monetarily to the preparation or submission of this brief. *Amici* are filing this brief with the consent of the parties. Written consents are on file with the Clerk.

about the extent of protection afforded the newsgathering undertaken by *amici* on a daily basis. Moreover, the decision below, and other recent decisions like it, will chill relationships between *amici*'s reporters and their sources. *Amici* thus have a strong interest in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

As the petitions for certiorari have shown, these cases merit review because the circuits are in disarray in their interpretations of this Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), and because circumstances requiring the assertion of the reporter's privilege have begun to arise with increasing – indeed alarming – frequency. Those factors alone provide sufficient grounds to grant review. But there are other considerations that underscore the need for the Court to grant certiorari.

The division among the circuits over whether and how the First Amendment protects journalists from forced disclosure of their confidential sources reflects an underlying inconsistency in the law. This Court's First Amendment jurisprudence, much of it developed since *Branzburg* was decided, includes cases taking two quite different approaches to the question whether the Constitution demands heightened scrutiny when facially neutral, generally applicable laws are being applied in a manner that will burden the exercise of First Amendment rights. On the one hand, in cases like *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), the Court has stated that generally applicable laws unrelated to expression categorically do not create First Amendment issues, even when they are applied in a way that will burden expression. But in a wide variety of other cases, the Court has taken just the opposite approach, holding that generally applicable laws *do* require heightened scrutiny when they pose a genuine risk to First Amendment values.

A grant of review here would provide the Court with an opportunity to resolve this doctrinal tension. Moreover, as we show, it is possible to articulate workable standards that reconcile these seemingly inconsistent lines of cases. Where, as in *Cowles Media* and similar cases, the claim of burden on freedom of expression is facially unpersuasive, no heightened scrutiny of the application of general laws in particular cases is required. But where application of any law threatens to impose *real* burdens on free speech rights, the Court should apply heightened scrutiny under the First Amendment, as it has done many times in the past. Such an application of heightened scrutiny is particularly appropriate where a mechanism already exists for measuring the burdens the law imposes on First Amendment rights.

Under this approach, heightened First Amendment scrutiny should apply when journalists resist compelled revelation of their confidential sources. Forcing reporters to breach promises of confidentiality would seriously damage the press's newsgathering role, which in turn would deprive the citizenry of information of great public concern. Moreover, here there already exist procedural and judicial mechanisms that can accommodate the reporter's privilege, easing any concerns about workability. Independently, the same considerations would warrant recognition of a common law (but constitutionally infused) privilege. The Court should grant certiorari to resolve these pressing issues.

ARGUMENT

I. The Court Should Revisit *Branzburg*, Which Is Emblematic of an Important Doctrinal Tension Within the Court's First Amendment Jurisprudence Regarding Generally Applicable Laws.

Amici respectfully suggest that the important issues raised by press subpoenas and the reporter's privilege cannot be

adequately addressed simply by attempting to parse the precedential meaning of *Branzburg*'s majority opinion or Justice Powell's "enigmatic concurring opinion," 408 U.S. at 725 (Stewart, J., dissenting). Rather, the Court should focus on the more basic principles at issue here. Key to that undertaking is the question whether generally applicable laws that burden press and speech rights require a degree of heightened constitutional review. Federal Rule of Criminal Procedure 17, the law at issue here, is a neutral and generally applicable grant of authority for subpoenas in criminal cases. But application of that law to require disclosure of reporters' confidential sources can have a significant chilling effect on newsgathering, as the record in this case demonstrates. *See* Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-114a, 165a-179a, 207a-225a. This Court's First Amendment cases provide support both for applying heightened scrutiny in such a context as well as for withholding such scrutiny altogether.[2] That ambivalence, in fact, is reflected in *Branzburg* itself, where the Court seemed to come down on both sides of the doctrinal divide. The Court should grant review to remedy the confusion created by these two competing doctrinal strands.

1. On one side of the divide are cases like *Cowles Media*, which suggest that as a categorical matter, generally applicable laws raise no problems under the First Amendment. *See* 501 U.S. at 669 ("[G]enerally applicable

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[2] *See, e.g.*, David Bogen, *Generally Applicable Laws and the First Amendment*, 26 Sw. U. L. Rev. 201, 201-02, 203 (1997) (stating that the cases are "in conflict" and send "mixed signals"); Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 Wm. & Mary L. Rev. 925, 939 (1998) (calling the doctrine in speech and press cases "confused"); Srikanth Srinivasan, *Incidental Restrictions of Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 Const. Comment. 401, 402 (1995) ("Free speech doctrine is unclear [regarding whether] such incidental restrictions raise a First Amendment concern.").

laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news"). In concluding that a general law that "does not target or single out the press" does not trigger heightened constitutional scrutiny, *id.* at 670, the Court relied on cases applying general regulatory laws such as the Sherman Act and labor laws to press companies. *See id.* at 669-70. "[E]nforcement of such general laws against the press," the Court said, "is not subject to stricter scrutiny than would be applied to enforcement against other persons or organizations." *Id.* at 670.

2. This categorical rejection of special scrutiny for generally applicable laws is, however, at odds with a wide variety of cases in which the Court has indicated that general applicability is not the end of the First Amendment inquiry. Indeed, this other set of cases *confirms* the need to weigh First Amendment concerns when applying general laws to the press. At least three areas of the Court's First Amendment jurisprudence reflect this other doctrinal strand:

a. First, the Court has recognized the need to balance First Amendment interests when considering the application of general laws that have the potential to disrupt the newsgathering process. In *Zurcher v. Stanford Daily*, for example, the Court confronted the question whether the First Amendment barred police from searching a newspaper office pursuant to an otherwise valid search warrant. 436 U.S. 547 (1978). Writing for a five-Justice majority, Justice White rejected a *per se* bar on such searches, but his opinion recognized that prior cases "insist that the courts apply the warrant requirements with particular exactitude *when First Amendment interests would be endangered.*" *Id.* at 565 (emphasis added); *see id.* at 564-65 (citing cases holding that ordinary procedures for obtaining search warrants are insufficient where the warrant seeks material protected by the

First Amendment, such as books). Further, the Court emphasized that magistrates should "guard against searches of the type, scope, and intrusiveness that would actually interfere with the timely publication of a newspaper." *Id.* at 566. As in *Branzburg*, Justice Powell provided the decisive vote and explained that a balancing approach is required:

> As the Court's opinion makes clear, the magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case . . . . [A] magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the First Amendment . . . when he weighs such factors.

Id. at 570 (Powell, J., concurring) (citation omitted).[3]

To similar effect is *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), which involved, *inter alia*, a ban on visitors bringing cameras into a prison. The policy applied to all visitors, including the media, but the effect of the policy was to impose a burden on journalists' ability to report on prison conditions. No opinion garnered a majority, but Justice Stewart cast the deciding vote. He rejected the argument that the Court should ignore the burden imposed by such a general policy on the press's newsgathering role. To the

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[3] A year later, in *Herbert v. Lando*, the Court addressed the related question whether libel plaintiffs could conduct discovery into a press defendant's editorial processes. The Court declined to impose a *per se* bar but again warned that the rules of discovery should be "firmly applied" to protect the media from undue burdens. 441 U.S. 153, 177 (1979); *see also id.* at 178-79 (Powell, J., concurring) (explaining that a court "has a duty to consider First Amendment interests" and "when a discovery demand arguably impinges on First Amendment rights a district court should measure the degree of relevance required in light of both the private needs of the parties and the public concerns implicated").

contrary, "the concept of equal access must be accorded more flexibility in order to accommodate the practical distinctions between the press and the general public." *Id.* at 16 (Stewart, J., concurring). Therefore, the incidental burden on freedom of the press had to be considered:

> The Constitution requires sensitivity . . . to the special needs of the press in performing [its role] effectively. . . . [T]erms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

Id. at 17.

The Court has demanded similar sensitivity in other cases where general laws impinged on the press's ability to function. For example, the tort of intentional infliction of emotional distress is a neutral and generally applicable law that regulates many kinds of behavior, but it is nonetheless subject to First Amendment limits. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 52-56 (1988). To treat publications the same as other means of causing distress would threaten to undermine robust public debate. *Id.* at 53-56; *cf. NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 891, 911-15 (1982) (holding that state tort of malicious interference with business could not be applied to boycott that was protected by freedoms of speech and assembly).

b. Second, the Court has applied heightened scrutiny to laws of general applicability in its "expressive conduct" cases. *See, e.g., United States v. O'Brien*, 391 U.S. 367, 376-77 (1968); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566-67 (1991) (plurality opinion). The *O'Brien* line of cases involves situations in which a person is attempting to express something by engaging in conduct that is proscribed

for reasons other than its expressive potential – such as destroying a draft card or sleeping in a park (both of which can be part of a protest). *See O'Brien*, 391 U.S. at 376; *Clark*, 468 U.S. at 293. Although these cases involve laws of general applicability, the Court nevertheless has mandated heightened First Amendment scrutiny of their application to expressive conduct.

A general ban on public nudity, to take one recurring example, ostensibly applies to expressive and non-expressive conduct alike, but this Court has held that such a law's incidental burden on expressive nude dancing nonetheless triggers First Amendment scrutiny. *See, e.g.*, *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (plurality opinion of O'Connor, J.) (applying intermediate scrutiny even though the challenged ordinance was "a general prohibition on public nudity"); *id.* at 310 (Souter, J., concurring in part and dissenting in part); *id.* at 317 (Stevens, J., dissenting). The Court has declined to hold that, because of the generality of the ban, the incidental burden on expression "'is not subject to First Amendment scrutiny at all.'" *Id.* at 307-08 (Scalia, J., joined by Thomas, J., dissenting) (quoting *Barnes*, 501 U.S. at 572 (Scalia, J., concurring in the judgment)).

The Court has taken a similar approach in its "expressive association" cases, which require First Amendment scrutiny of generally applicable anti-discrimination laws. *See, e.g., Boy Scouts of America v. Dale*, 530 U.S. 640 (2000); *Roberts v. United States Jaycees*, 468 U.S. 609 (1984). Even though such laws regulate conduct that is typically non-expressive, the cases require stringent constitutional review approaching strict scrutiny when those general laws are applied in a manner that burdens an association's ability to engage in expression. *See Dale*, 530 U.S. at 648.

c. Third, in cases blending free speech and free exercise concerns, the Court has repeatedly held, before and

after *Branzburg*, that the general applicability of a law in no way prevents a constitutional violation. *See, e.g., Wooley v. Maynard*, 430 U.S. 705 (1977) (invalidating law against defacing license plates as applied to those who objected to the state's motto on moral and religious grounds); *Follett v. Town of McCormick*, 321 U.S. 573 (1944) (invalidating license tax on solicitation as applied to the dissemination of religious ideas); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943) (same); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (invalidating licensing scheme for those engaged in charitable and religious solicitations as applied to Jehovah's Witnesses). Indeed, *Murdock* specifically explained that the general applicability of the solicitation tax at issue there could not save it: "The fact that the ordinance is 'non-discriminatory' is immaterial. . . . A license tax certainly does not acquire constitutional validity because it classifies the privileges protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike." 319 U.S. at 115.

Likewise, in *Wisconsin v. Yoder*, which invalidated a school attendance law as applied to the Amish, the Court directly rejected a general applicability test:

> [T]o agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, *even under regulations of general applicability* . . . . A regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it *unduly burdens* the free exercise of religion.

406 U.S. 205, 219-20 (1972) (emphasis added).

Yet here, too, this Court's decisions reflect some tension. In *Employment Division v. Smith*, 494 U.S. 872 (1990), the Court held that the First Amendment was not implicated by a criminal law of general applicability (a law banning peyote) when it burdened religious practices. "[I]f prohibiting the exercise of religion . . . is . . . merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." *Id.* at 878. Four Justices rejected a categorical rule, saying "[t]here is nothing talismanic about neutral laws of general applicability." *Id.* at 901 (O'Connor, J., concurring in the judgment).

3. *Branzburg*, as noted, is emblematic of this doctrinal tension, which likely explains why the lower courts have divided over its meaning. Reaching toward one doctrinal strand, Justice White wrote that the First Amendment "does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability." 408 U.S. at 682. At the same time, the opinion ultimately stopped short of ruling that general applicability is the end of the constitutional inquiry. Although the Court was unwilling to quash the press subpoenas "[o]n the records now before [it]," *id.* at 690, it also recognized that "news gathering is not without its First Amendment protections," that grand juries "must operate within the limits of the First Amendment as well as the Fifth," and that courts *should* quash press subpoenas in some cases, *id.* at 707-08. Justice Powell, who provided the pivotal fifth vote, read the majority opinion as mandating a case-by-case inquiry that strikes "a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct." *See id.* at 709-10 (Powell, J., concurring). Under that reading, a court could exempt reporters from testifying on a case-by-case basis, based on the asserted First Amendment interest –

a view more in keeping with the line of cases that have subjected generally applicable laws to heightened scrutiny.

II. Properly Understood, the Court's Cases Reflect a Practical Approach Attuned to the Actual Burdens at Issue in Each Situation.

Amici suggest that the best way to make sense of and to reconcile these divergent opinions is to view them as reflecting a practical approach that responds to the actual burdens on First Amendment interests in each case. Where application of a general law imposes a burden on the press no greater than that imposed on any citizen, there is no need to apply heightened constitutional scrutiny. Where, however, there is a genuine threat to First Amendment values, the Court applies heightened First Amendment scrutiny even if the law is one of general applicability.[4] Secondarily, the Court also looks to whether the statutory or regulatory scheme has a built-in mechanism that can accommodate a particularized assessment of First Amendment concerns.

Cases like *Cowles Media*, in which the Court has made categorical pronouncements to the effect that generally applicable laws incidentally burdening the press do not trigger First Amendment scrutiny, are best understood as involving no real threat to the press's societal functions. *Cowles Media* itself was a civil suit against two newspapers brought by a source whose identity the newspapers had revealed after they had promised him confidentiality. The Court held that the First Amendment did not immunize the

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[4] *See* Michael C. Dorf, *Incidental Burdens on Fundamental Rights*, 109 Harv. L. Rev. 1175, 1210 (1996) (existing doctrine "treats substantial incidental burdens as raising a bona fide constitutional problem" but ignores insubstantial burdens); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. Chi. L. Rev. 46, 112 (1987) (concluding that "the Court will undertake first amendment review when an incidental restriction has a significant effect on free expression").

press from the doctrine of promissory estoppel. *Cowles Media*, 501 U.S. at 668-69. That is because application of that doctrine did not threaten newsgathering or First Amendment values. To the contrary, any restriction on the newspapers' ability to print truthful information about the informant resulted from a "self-imposed" promise. *Id.* at 671. And the press's ability to have promises of confidentiality regarded as credible clearly *aids* the newsgathering function. Rendering such promises legally unenforceable would only have impaired newsgathering.

Cowles Media fits into a line of cases holding that various regulatory laws apply to media businesses just as they apply to businesses generally. *Id.* at 669; *see, e.g.*, *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 576-79 (1977) (copyright laws); *Oklahoma Press Publ'g Co. v. Walling*, 327 U.S. 186, 192-93 (1946) (Fair Labor Standards Act); *Associated Press v. United States*, 326 U.S. 1, 19-20 (1945) (Sherman Act); *Associated Press v. NLRB*, 301 U.S. 103, 132-33 (1937) (National Labor Relations Act). What should be clear from these cases is that none poses any real risk to First Amendment values. Requiring press enterprises to pay the minimum wage, for instance, has little to do with their reporters' ability to uncover government misdeeds, expose official action to public scrutiny, and so forth.

At the same time, this Court has also recognized that, as a practical matter, general applicability is not always a reliable indication that First Amendment values are safe. That is why, as the Court recognized in *Zurcher*, the caselaw "insist[s] that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered." 436 U.S. at 565. And it is also why the Court warned that the courts must "guard against searches of the type, scope, and intrusiveness that would *actually interfere* with the timely publication of a newspaper." *Id.* at

566 (emphasis added). Where there is a danger of "actually interfer[ing]" with freedom of the press, the Court has not been content to rely on general applicability.

Similarly, the Court's expressive conduct cases are premised on the fact that neutral laws targeting proscribable conduct can pose constitutionally relevant burdens on expression despite their generality. When a particular application of such a law creates that risk, the Constitution demands heightened scrutiny. *O'Brien*, 391 U.S. at 376-77 (law against damaging draft cards that impinged on war protests); *Clark*, 468 U.S. at 293-98 (ban on camping in parks that burdened demonstration for the homeless); *Pap's A.M.*, 529 U.S. at 289 (prohibition of public nudity that interfered with expressive dancing). As we show below, the claims of reporter's privilege at issue here fall into this category because there can be little doubt that the essential newsgathering function of the press will be compromised if reporters are routinely forced to reveal sources.

Another factor also helps to reconcile the Court's cases in this area. In assessing a First Amendment challenge to a generally applicable law, the Court has found it relevant whether some mechanism for weighing various burdens imposed by a particular enforcement of such a law already exists. The presence of a built-in mechanism that can readily accommodate consideration of First Amendment values in specific cases eases the practical difficulties of applying heightened scrutiny to a particular regulatory scheme.

For example, this factor helps to explain the different outcomes in cases like *Employment Division v. Smith* and *Sherbert v. Verner*, 374 U.S. 398 (1963). In *Smith*, where the Court upheld application of a drug law that burdened religious practices, the Court discussed cases like *Sherbert*, which held that a state could not enforce its general rules governing unemployment benefits in a way that burdened

workers whose religion forbade work on Saturday. The Court distinguished *Sherbert* on the ground that it arose in "a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct. . . . [A] distinctive feature of unemployment compensation programs is that their eligibility criteria invite consideration of the particular circumstances behind an applicant's unemployment." *Smith*, 494 U.S. at 884.

The *Smith* Court expressed concern that writing a religious exemption into the legislature's categorical ban on peyote use would raise practical problems *See id.* at 885. But as the Court's treatment of *Sherbert* indicates, it believed that consideration of First Amendment concerns was more workable – and thus appropriate – where the regulatory scheme already contained a mechanism for considering the burdens imposed in particular cases. As *amici* show below, this principle is relevant to the reporter's privilege because here too there already exist procedural mechanisms for quashing unduly burdensome subpoenas and discovery requests, ameliorating worries about administrability.

III. The Court Should Grant Certiorari and Enforce a First Amendment Privilege or a Comparable Common Law Privilege.

Under a rule that requires heightened scrutiny when a given application of a general law is likely to burden First Amendment rights, a subpoena seeking the identity of a confidential source would require heightened scrutiny. Compelled disclosure of confidential sources threatens the vigorous and independent press that the Framers knew was crucial to effective self-government. Moreover, the privilege can be applied without undue practical difficulties.

A subpoena demanding revelation of confidential sources poses a fundamentally different situation from cases of the *Cowles Media* variety, which involve the application of

general business and regulatory laws to press enterprises. In the *Cowles Media* line of cases, there is no serious threat to the press's journalistic functioning. (Indeed in *Cowles Media* the application of general business laws arguably *aided* the press by promoting confidential communications between sources and reporters.) Unlike labor laws, general taxes, and antitrust laws, press subpoenas put First Amendment values at risk and impose constitutionally compelling burdens.

As a threshold matter, the Court has on multiple occasions recognized that the First Amendment protects the process of gathering the news as well as publishing it. *Branzburg* itself explicitly stated that the First Amendment requires "protection for seeking out the news." *Branzburg*, 408 U.S. at 681. Protection of the newsgathering process is necessary for the common-sense reason that the press can only report what it is able to learn. As the Court emphasized in a case vindicating the press's right of access to a trial, "[t]he explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576-77 (1980) (plurality opinion of Burger, C.J.);[5] *see also Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (observing that the "First Amendment guarantees of a free press" forbid governmental regulation of the "crucial" editorial process).

There can be no doubt that the constitutional protection for "seeking out the news" encompasses interviewing sources, including confidential ones. *See Branzburg*, 408 U.S. at 709 (Powell, J., concurring) (explaining that under the majority opinion, journalists retain "constitutional rights

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[5] Although no opinion garnered a majority in *Richmond Newspapers*, seven of the eight participating Justices agreed that the First Amendment provided a right of access to the trial.

with respect to the *gathering of news or in safeguarding their sources*" (emphasis added)). Journalists frequently depend on confidential sources to gather news, and this is especially true with regard to the most valuable investigative stories. *See, e.g.*, John E. Osborn, *The Reporter's Confidentiality Privilege: Updating the Empirical Evidence After a Decade of Subpoenas*, 17 Colum. Hum. Rts. L. Rev. 57, 74 (1985) (reporting that confidential sources played "a significant role" in two-thirds of the stories nominated for Pulitzer Prizes). A press that can only reprint government statements would fail to play its important constitutional role of "keeping officials elected by the people responsible to all the people whom they were selected to serve," *Mills*, 384 U.S. at 219; *cf. Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 103-04 (1979) ("A free press cannot be made to rely solely upon the sufferance of government to supply it with information.").

Forced disclosure of confidential sources substantially hampers the protected activity of newsgathering. Justice White's majority opinion in *Branzburg* admitted that press subpoenas could lead to "consequential" burdens on newsgathering 408 U.S. at 690. And since the time of *Branzburg*, many courts have agreed with Justice Stewart's common-sense assessment that, without the protections of a reporter's privilege, "sources will clearly be deterred from giving information, and reporters will clearly be deterred from publishing it," *id.* at 731 (Stewart, J., dissenting); *see, e.g.*, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (concluding that forced revelation of confidential sources "may significantly interfere with [the media's] news gathering ability"). In the district court, Petitioners submitted affidavits from themselves and prominent historians and journalists detailing the ways in which forced disclosure of confidential sources would harm their ability to inform the public on matters of great societal concern. Cooper/Time Pet. App. 123a-137a; Miller Pet. App. 108a-

114a, 165a-179a, 207a-225a. That compelled disclosure raises serious concerns is further evidenced by the judgment of the forty-nine states (plus the District of Columbia) that recognize some form of a reporter's privilege. *See* Miller Pet. App. 50a (Tatel, J., concurring in the judgment).

Recognizing a constitutionally based reporter's privilege coheres with recent trends in this Court's jurisprudence. Increasingly, the Court has begun to take a practical approach that applies varying degrees of heightened scrutiny in other contexts that – like this one – have important constitutional interests on both sides of the equation. For example, in *Turner Broadcasting System, Inc. v. FCC*, the Court invoked *O'Brien* to analyze the constitutionality of rules requiring cable systems to carry local broadcast channels. 512 U.S. 622, 662 (1994). These "must carry" rules raised First Amendment concerns because they required the transmission of certain signals, but the rules were also justified on the ground that they fostered free, over-the-air programming and promoted the multiplicity of viewpoints that is "central to the First Amendment." *Id.* at 662-64. Similarly, in *Bartnicki v. Vopper*, the Court was called upon to weigh the First Amendment value of illegally intercepted telephone calls against the privacy interests that the wiretap law promoted. 532 U.S. 514, 532-35 (2001). In neither case did the Court ignore the constitutional values on one side; rather, the Court took a practical approach attuned to the actual burdens involved. *See also Denver Area Educ. Telecomms. Consort., Inc. v. FCC*, 518 U.S. 727, 740-41 (1996) (plurality opinion) (explaining that the Court applies its First Amendment analysis in light of "the balance of competing interests and the special circumstances of each field of application"); *Bartnicki*, 532 U.S. at 536 (Breyer, J., concurring) ("Given these competing interests on both sides of the equation, the key question becomes one of proper fit." (internal quotation marks omitted)). The same should be true here, because "the

invocation of grand jury interests is not some talisman that dissolves all constitutional protections." *Butterworth v. Smith*, 494 U.S. 624, 630 (1990) (internal quotation marks omitted).

As noted above, the Court has found it especially appropriate to subject generally applicable laws to First Amendment scrutiny when there already exists a procedural mechanism that would ease concerns about administrability. *See supra* p. 13-14. Here such a mechanism exists in the form of federal procedural rules that protect parties from unduly burdensome subpoenas and other discovery demands. *See* Fed. R. Crim. P. 17(c)(2) (permitting court to quash criminal subpoenas "if compliance would be unreasonable or oppressive"); Fed. R. Civ. P. 45(c)(3) (permitting court to quash or modify "undu[ly] burden[some]" civil subpoenas); Fed. R. Civ. P. 26(b)(2), (c) (permitting the court to grant relief from unduly burdensome discovery requests). Because these procedures already exist, the courts would not find (and have not found) great difficulty in considering First Amendment concerns along with the myriad other factors that are already being considered. Indeed, given the breadth of the considerations that can justify a restriction on discovery in the name of undue burden,[6] it would be anomalous if the First Amendment could *not* be considered when other types of arguably less significant burdens regularly are considered. As the Court stated in *Smith*, it would be improper to exclude interests protected by the First Amendment from the calculus. 494 U.S. at 884 ("[W]here

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[6] *See* 2 Charles Alan Wright, *Federal Practice and Procedure* § 275, at 262 n.25 (3d ed. 2000) (citing a sampling of cases demonstrating the variety of circumstances that can justify relief under Federal Rule of Criminal Procedure 17(c)(2)); 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2459, at 47-48 & n.32 (2d ed. 1995) (illustrating the "wide variety of factual contexts" that justify quashing a subpoena under Federal Rule of Civil Procedure 45(c)).

the State has in place a system of individual exemptions, it may not refuse to extend that system to cases of 'religious hardship' without compelling reason."); *see Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 537-38 (1993) (where ordinance barring killing animals contained various exceptions for "necessary" killings, religious reasons for killing animals could not be disregarded).

Further demonstrating that the reporter's privilege is readily administrable, the last thirty years have shown that the *Branzburg* majority overestimated the "practical and conceptual difficulties" involved in "defin[ing] those categories of newsmen who qualif[y] for the privilege," 408 U.S. at 704. Because most federal courts have recognized the reporter's privilege at least in some contexts, they have developed experience and expertise in dealing with such questions.[7] The tests they have employed are no less workable than other familiar inquiries such as, for example, whether material was produced in anticipation of litigation so as to qualify as protected work product. The lower courts have shown themselves more than equal to the task of administering the privilege.

Finally, even if the First Amendment did not of its own force require the reporter's privilege, the underlying constitutional concerns, and other reasons of sound policy, would support the privilege as a matter of federal common

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[7] *See, e.g., In re Madden*, 151 F.3d 125, 130 (3d Cir. 1998) (holding that the privilege is applicable to persons who are "engaged in investigative reporting, gathering news, and [who] have the intent at the beginning of the news-gathering process to disseminate this information to the public"); *von Bulow v. von Bulow*, 811 F.2d 136, 144 (2d Cir. 1987) (holding that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material – sought, gathered or received – to disseminate information to the public and that such intent existed at the inception of the newsgathering process").

law. In federal question cases, the courts are authorized "to define new privileges by interpreting 'common law principles . . . in light of reason and experience.'" *Jaffee v. Redmond*, 518 U.S. 1, 8 (1996) (quoting Fed. R. Evid. 501; alteration in original). *Branzburg* did not and could not consider the distinct authority conferred under Rule 501, which was enacted several years after *Branzburg* was decided.[8] Because *Branzburg*'s analysis concerned the First Amendment, debates over the status of the reporter's privilege have largely played out as a matter of constitutional law. But many of the same principles that require heightened scrutiny of press subpoenas under the Constitution support recognition of a common law reporter's privilege. The press plays an "essential role in our democracy," *New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (Black, J., concurring), and the "free flow of information to the people" concerning the conduct of their public officials is of "*paramount* public interest." *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964) (emphasis added). Surely this interest is at least as important as the public interest that justified the psychotherapist privilege in *Jaffee*, 518 U.S. at 11. The recognition of a reporter's privilege in forty-nine states and the District of Columbia, moreover, strongly supports the adoption of a similar federal privilege. Resolving the split in the lower federal courts by enforcing a common law privilege provides an independent reason for granting review.

CONCLUSION

The petitions for certiorari should be granted.

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[8] Even if *Branzburg* were controlling on the common law question, *see* Miller Pet. App. 22a-24a (Sentelle, J., concurring), that conclusion should be reconsidered based on the developments in First Amendment law described herein and the developments with regard to state law and the federal law of privileges discussed in the petitions.

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May 18, 2005

DESCRIPTION OF *AMICI CURIAE*

The American Society of Newspaper Editors (ASNE) is a nonprofit organization founded in 1922. It has a nationwide membership of over 800 persons who hold positions as directing editors of daily newspapers throughout the United States, with members recently being added in Canada and other countries in the Americas. The purposes of the Society include assisting journalists and providing an unfettered and effective press in the service of the American people.

Bloomberg L.P., based in New York City, operates Bloomberg News, which is comprised of more than 1,800 reporters in eighty-seven bureaus around the world, including world headquarters in New York City. Bloomberg News publishes more than 4,000 news stories each day, electronically delivering business, financial, and legal news to more than 300,000 business and finance professionals in real-time through the Bloomberg Professional Systems, a proprietary desktop system. Bloomberg News also operates as a wire service, distributing news to more than 375 newspapers in twenty-five countries. Bloomberg News operates eleven 24-hour cable and satellite news channels broadcasting worldwide in six different languages; WBBR, a 24-hour business news radio station; Bloomberg Press, a book publisher responsible for more than 100 book titles a year; Bloomberg Magazines, which publishes two different magazines each month; and Bloomberg.Com, which is read by the investing public more than 300 million times each month.

The Copley Press, Inc. is a privately held newspaper publishing company that, directly or through subsidiaries, publishes *The San Diego Union-Tribune* and nine other daily newspapers in California, Illinois, and Ohio and operates Copley News Service, an international news service.

Cox Newspapers, Inc. ("CNI") is a wholly-owned direct subsidiary of Cox Enterprises, Inc. ("Cox"). Cox, through its Atlanta Newspapers Division and CNI, publishes seventeen daily and twenty-five non-daily newspapers.

Daily News, L.P. publishes the New York *Daily News*, which is one of the largest newspapers in the United States and has a daily circulation of more than 700,000 and a Sunday circulation of more than 800,000, primarily in the New York metropolitan area.

The E.W. Scripps Company is a diverse media company with interests in newspaper publishing, broadcast television, and national television networks. The company operates 17 daily newspapers, with a combined paid daily circulation of 1.24 million; 15 broadcast television stations, including six ABC affiliates and three NBC affiliates; and five cable and satellite television programming networks and a television retailing network totaling more than 84 million subscribers.

Fox News Network, L.L.C. owns and operates the national cable news network, the "Fox News Channel," which reaches approximately 85 million subscribers in the United States. It also owns and operates the broadcast service, the "Fox News Edge," the Sunday morning political talk program, "Fox News Sunday," the website "FoxNews.com," and the national Fox News Radio Network.

Knight Ridder is the nation's second-largest newspaper publisher, with products in print and online. The company publishes 31 daily newspapers in 28 U.S. markets, with a

readership of 9.0 million daily and 12.7 million Sunday. The company's Internet operation, Knight Ridder Digital, develops and manages the company's online properties and operates Real Cities (www.RealCities.com), the largest national network of city and regional Web sites, in more than 105 U.S. markets. Knight Ridder and Knight Ridder Digital are headquartered in San Jose, California.

The McClatchy Company publishes 12 daily newspapers and 18 non-daily newspapers in California and other states, including *The Sacramento Bee*, the *Star Tribune* in Minneapolis, Minnesota, *The News & Observer* in Raleigh, North Carolina, and *The Fresno Bee*. The newspapers have a combined average circulation of approximately 1,400,000 daily and 1,900,000 Sunday.

The McGraw-Hill Companies, Inc. is a multimedia publishing and information company that publishes books and magazines, including *BusinessWeek*, and also operates four local television stations.

The National Association of Broadcasters (NAB), organized in 1922, is a nonprofit incorporated trade association that serves and represents radio and television broadcast stations. NAB's members cover, produce, and broadcast the news and other programming to the American people. NAB seeks to preserve and enhance its members' ability to freely disseminate programming and information of all types.

The Newspaper Association of America is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. Its members account for nearly 90 percent of the daily newspaper circulation in the United States and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to gather and report the news.

The New York Press Club is an association of more than 700 members currently or formerly in the news media. The organization was established in July 1948 for the main purpose of promoting freedom of the press and secondarily to provide educational services for those entering and already in the field of journalism. The organization is headquartered in New York City and now represents members throughout the New York metropolitan area in both electronic and print media.

NYP Holdings, Inc. is the publisher of the *New York Post*, which is the longest continuously published daily newspaper in the United States, founded in 1801 by Alexander Hamilton. It is currently the seventh largest newspaper in the country with a daily readership of over 2 million. The *New York Post* has a daily circulation of 678,012 and a Sunday circulation of 467,005.

The Radio-Television News Directors Association (RTNDA) is a professional association devoted to electronic journalism. RTNDA represents local and network news executives, educators, students, and others in the radio, television, and cable news business worldwide. RTNDA's general nature and purpose is to encourage excellence in the electronic journalism industry and to work to uphold and promote the First Amendment freedoms of the news media.

Reporters Without Borders is an international press freedom organization that has been defending people's right to inform and to be informed for 20 years. It campaigns to obtain the release of imprisoned journalists, put an end to censorship, improve journalists' safety, support an independent media, and promote legal action that will bring to justice those responsible for murdering journalists.

Reuters America LLC is an indirect subsidiary of Reuters Group Plc. Founded in 1851 in London, Reuters serves the global financial markets and news media with a

wide range of information products and transactional solutions. These include real-time and historical market data; research and analytics; trading platforms across a range of financial instruments; collective investment data and benchmarking analytics; plus news in text, video, graphics, and photographs. Some 327,000 financial market professionals working in the equities, fixed income, foreign exchange, money, commodities, and energy markets around the world use Reuters products. Reuters is also the world's largest international text and television news agency with 2,300 journalists, photographers, and camera operators in 197 bureaus around the world, serving 130 countries, and publishes approximately 30,000 headlines daily, including third party contributions, in 19 languages.

The White House Correspondents' Association was founded in 1914 and represents the White House press corps in its dealings with White House and other executive branch officials on coverage-related issues. A nine-member board of directors, elected by correspondents, addresses access to the chief executive; coverage arrangements; work space arrangements; and logistics and costs for press travel to accompany a president on the road.

Supreme Court, U.S.
FILED
MAY 18 2005
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(3) (3)

Nos. 04-1507 & 04-1508

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JUDITH MILLER, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

MATTHEW COOPER and TIME INC., *Petitioners*,

v.

UNITED STATES OF AMERICA, *Respondent*.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CENTER FOR INDIVIDUAL FREEDOM IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*[1]

The Center for Individual Freedom (the "Center") is a non-partisan, non-profit organization with the mission to

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[1] This brief is filed with the written consent of both parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *Amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief.

protect and defend individual freedoms and individual rights guaranteed by the Constitution of the United States, including free speech rights, free press rights, privacy rights, and the freedom of association. Of particular importance to the Center in these cases is the need to vigilantly safeguard the First Amendment rights of all newsgatherers, publishers, and the public, who depend on the protection of confidential sources in gathering, publishing, and receiving news, information, and commentary.

The Center's interest in these cases stems not only from its principled commitment to protect and defend the constitutional rights of all newsgatherers, publishers, and the public, but also from the Center's practical experience as a newsgatherer, information source, and publisher, itself. As a vocal proponent of individual freedom, open government, and public accountability, the Center engages in direct-to-the-public advocacy by disseminating news, information, and commentary through a variety of media, including its own Internet website, <http://www.cfif.org>, which is updated weekly and visited by millions of readers each year. The Center's advocacy is dependent upon an ability to gather information from all types of sources, including those who require their identities remain confidential, so that the Center is able to enlarge public knowledge and encourage public discourse on matters of importance.

SUMMARY OF ARGUMENT

It is long past time for this Court — the final arbiter of the Constitution of the United States — to reconsider and clarify whether and when the First Amendment protects newsgatherers from compelled disclosure of their confidential news sources pursuant to legal proceedings. These constitutional questions of the utmost importance have confounded and divided the federal circuit courts, federal district courts, and state courts of record for more than three

decades. Indeed, given the multiplicity of conflicting rulings, newsgatherers now find they enjoy dramatically different First Amendment protections for their confidential news sources from one jurisdiction to the next, from one type of case to another, and even from federal to state courts. This arbitrary jurisprudential patchwork not only threatens the constitutional rights of newsgatherers, their confidential sources, and the public by chilling important protected speech, it also undermines the First Amendment, itself, which is supposed to be the "supreme Law of the Land" in each legal proceeding in every court across the country. Moreover, in the generations since this Court considered these constitutional questions, there has been a sea change in the protection of confidential news sources and truthful information that indicates a national consensus among the states in favor of a reporter's privilege that shields newsgatherers like the Petitioners in these cases.

Additionally, these cases warrant review because the court below upheld the contempt citations against and the imprisonment of the journalists based, at least in part, on secret evidence submitted by the prosecutor and considered by the court *ex parte*. That ruling directly conflicts with the overwhelming weight of authority from this Court and others. Indeed, even in cases that involve far more compelling and certain concerns, this Court has consistently held that, at a minimum, due process requires the opportunity to review and rebut the evidence presented before an accused can be "deprived of life, liberty, or property."

ARGUMENT

I. THIS COURT SHOULD CLARIFY WHETHER AND WHEN THE FIRST AMENDMENT PROTECTS CONFIDENTIAL NEWS SOURCES FROM COMPELLED DISCLOSURE IN LEGAL PROCEEDINGS

It is always important to "start with first principles." *United States v. Lopez*, 514 U.S. 549, 552 (1995). With respect to the freedoms of speech and of the press guaranteed by the First Amendment, this means that governmental actions that interfere with the communication of truthful information and even controversial ideas raise constitutional concerns and are inherently suspect. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978). The U.S. Supreme Court has noted that even when the government's authority is at its zenith, such as when the government is protecting and vindicating civil society's standards through a criminal prosecution, adverse impacts on the First Amendment rights of others cannot be disregarded or ignored. *See generally Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Instead, those constitutional concerns must be taken into account when courts review the challenged state action by properly weighing the First Amendment interests at stake as an important counterbalance to the interests asserted against openness and the public's right to receive information and ideas. *See generally Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Communications, Inc.*, 435 U.S. 829.

These "first principles" lead to the conclusion that constitutional protections for free speech and free press, in one way or another, limit the authority of special counsel, prosecutors, criminal defendants, and civil litigants to compel newsgatherers and publishers to disclose confidential sources used in gathering and communicating news, information, and commentary to the public. The court below, however,

rejected this conclusion because the majority believed that this Court, in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "considered and rejected the same claim of First Amendment privilege on facts materially indistinguishable from those at bar." *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 968 (D.C. Cir. Feb. 15, 2005). Because that decision is in direct conflict with the rulings of other federal circuit courts, federal district courts, and state courts of record, not to mention a clear national consensus among the states in favor of a reporter's privilege protecting confidential news sources, this Court should grant review in these cases.

A. This Court Should Resolve the Conflicts and Confusion Over the Meaning and Application of *Branzburg*

It is definitely time for this Court to reconsider and clarify the meaning and application of *Branzburg v. Hayes*, 408 U.S. 665 (1972). As with *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), which this Court reconsidered and clarified two terms ago in *Grutter v. Bollinger*, 539 U.S. 306 (2003), and *Gratz v. Bollinger*, 539 U.S. 244 (2003), the *Branzburg* decision has created irreconcilable conflicts and undeniable confusion in the courts below. Today, there are no fewer than four different and inconsistent positions taken by the federal circuit courts that have interpreted *Branzburg* and decided whether and when the First Amendment provides a privilege protecting confidential news sources.[2]

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[2] Indeed, there could be more inconsistent positions on the interpretation of *Branzburg* yet to come since two circuits — the Eighth and Tenth — have yet to address whether the First Amendment offers any protection for confidential news sources in criminal proceedings. *See Cervantes v. Time Inc.*, 464 F.2d 986, 992 n.9 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433, 437 (10th Cir. 1977).

First, there are four circuits — the First, Second, Third, and Eleventh — that have held *Branzburg* recognized a First Amendment privilege protecting newsgatherers from the compelled disclosure of their confidential sources in all types of cases, both civil and criminal, including grand jury proceedings. *See, e.g., In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *United States v. Burke*, 700 F.2d 70, 77 (2d Cir.), *cert. denied*, 464 U.S. 813 (1983) (citing *Baker v. F & F Inv.*, 470 F.2d 778, 784 (2d Cir. 1972)); *Gonzales v. Nat'l Broad. Co.*, 194 F.3d 29, 36 (2d Cir. 1999);[3] *Riley v. City of Chester*, 612 F.2d 708, 714-15 (3d Cir. 1979); *United States v. Cuthbertson*, 630 F.2d 139, 147 (3d Cir. 1980), *cert. denied*, 449 U.S. 1126 (1981); *In re Grand Jury Subpoena* (*Williams*), 766 F. Supp. 358, 371 (W.D. Pa. 1991), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986), *cert. denied*, 482 U.S. 917 (1987), 483 U.S. 1021 (1987).

These are the circuits that most directly conflict with the decision of the court below.[4] *Compare In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 970 ("Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing

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[3] In *Gonzales v. National Broadcasting Co.*, the Second Circuit noted that "[p]revious decisions of our court have expressed differing views on whether the journalists' privilege is constitutionally required, or rooted in federal common law," explaining that, "[u]ntil Congress legislates to modify the privilege or do away with it, . . . we need not decide whether the privilege is founded in the Constitution." 194 F.3d 29, 36 n.6 (2d Cir. 1999).

[4] This is not to mention the state courts of last resort that, likewise, have concluded that *Branzburg* and the First Amendment stand for the proposition that newsgatherers enjoy a privilege protecting their confidential sources from compelled disclosure pursuant to grand jury proceedings. *See Cooper & Time Inc. v. United States*, No. 04-1508, Pet. for Writ of Cert., at 21-22 & n.6 (citing cases) (filed May 10, 2005).

before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source."), *with In re Grand Jury Subpoena of Williams*, 766 F. Supp. at 371 ("There is a qualified news gatherer's privilege against compelled disclosure of his or her news sources in a Grand Jury proceeding."), *aff'd by an equally divided court*, 963 F.2d 567 (3d Cir. 1992) (*en banc*).

Second, there is the interesting position of the Ninth Circuit, which has concluded that the First Amendment provides newgatherers with a privilege for the protection of their confidential sources in civil and criminal cases, but not grand jury proceedings. *See, e.g., Shoen v. Shoen*, 5 F.3d 1289, 1296 (9th Cir. 1993) (recognizing the reporter's privilege in a civil case); *Farr v. Pitchess*, 522 F.2d 464, 467-69 (9th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976) (applying the reporter's privilege in a criminal case); *In re Grand Jury Proceedings* (*Scarce v. United States*), 5 F.3d 397, 402 (9th Cir. 1993), *cert. denied*, 510 U.S. 1041 (1994) (rejecting the reporter's privilege in the context of a grand jury).

Third, three other circuits — the Fourth, Fifth, and the court below, the D.C. Circuit — have recognized a First Amendment-based reporter's privilege in civil cases while, at the same time, concluding that *Branzburg* eliminated the possibility of such protection in criminal cases. *Compare In re Shain*, 978 F.2d 850, 852-53 (4th Cir. 1992); *United States v. Smith*, 135 F.3d 963, 969 (5th Cir. 1998); and *In re Grand Jury Subpoena* (*Miller*), 397 F.3d 964, 970 (D.C. Cir. Feb. 15, 2005) (all rejecting a reporter's privilege in criminal proceedings); *with LaRouche v. Nat'l Broad. Co.*, 780 F.2d 1134, 1139 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980), *cert. denied*, 450 U.S. 1041 (1981); and *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) (all recognizing a reporter's privilege in civil cases).

Fourth and finally, there are the Sixth and Seventh Circuits, which have ruled that, in *Branzburg*, this Court rejected altogether a First-Amendment based privilege for newsgatherers and the protection of their confidential sources regardless of the type of legal proceeding in which the disclosure is sought. *See, e.g., In re Grand Jury Proceedings* (*Storer Communications, Inc. v. Giovan*), 810 F.2d 580, 584 (6th Cir. 1987); *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

It is evident why *Branzburg* and a First Amendment privilege protecting confidential news sources have so confused and divided the courts below. As was the case in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), the meaning and application of *Branzburg* depends upon the necessary fifth vote of Justice Powell.

It is true that, unlike in *Bakke*, Justice Powell joined the majority opinion in *Branzburg*. But not only is that five-vote majority opinion far from clear in foreclosing future assertions of a First Amendment-based newsgathering privilege, *see Branzburg*, 408 U.S. at 707 ("news gathering is not without its First Amendment protections"), Justice Powell also issued a concurring opinion specifically stating that *Branzburg* "does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources," *id.* at 709 (Powell, J., concurring), and that "the courts will be available to newsmen under the circumstances where legitimate First Amendment interests require protection," *id.* at 710 (Powell, J., concurring).

Indeed, Justice Powell noted in his concurring opinion that if a newsgatherer has some "reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered." *Id.* Justice Powell then

went on to explain that, in his opinion, "[t]he asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct," and that such a "balance of these vital constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicating such questions." *Id.* In other words, Justice Powell explicitly held that the First Amendment applied and offered at least some protection when newsgatherers face the compelled disclosure of their confidential sources in connection with legal proceedings.

The necessity of Justice Powell's vote and his concurring opinion's effect on the holding in *Branzburg* are the obvious reasons why the courts below are so hopelessly conflicted and confused. No fewer than eight of the federal circuits — including the court below in *Zerilli*, 656 F.2d at 711, and *Carey v. Hume*, 492 F.2d 631, 636 (D.C. Cir. 1974) — have held, at one time or the other, that Justice Powell's concurrence controls or narrows the holding in *Branzburg*. *See also Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 17-18 (collecting cases). Strikingly, even Judge Posner, who rejected the recognition of a reporter's privilege under the First Amendment for the Seventh Circuit, noted that he was unsure whether his reading of *Branzburg* was correct:

> Although the Supreme Court in *Branzburg* . . . declined to recognize such a privilege, Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings. Since the dissenting Justices would have gone further than Justice Powell in recognition of the reporter's privilege, and preferred his position to that of the

> majority opinion (for they said that his "enigmatic concurring opinion gives some hope of a more flexible view in the future"), maybe his opinion should be taken to state the view of the majority of the Justices — though this is uncertain, because Justice Powell purported to join Justice White's "majority" opinion.

McKevitt, 339 F.3d at 531-32 (citations omitted).

Moreover, the confusion as to meaning and application of *Branzburg* has only been exacerbated by the fact that this Court has explained in the past that its holdings are controlled by and should be understood to be those that can or did receive the assent of at least five justices. *See McKoy v. North Carolina*, 494 U.S. 433, 462 n.3 (1990) (Scalia, J., joined by Rehnquist, C.J., and O'Connor, J., dissenting) (a concurrence "can assuredly narrow what the majority opinion holds, by explaining the more limited interpretation adopted by a necessary member of that majority); *cf. Marks v. United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds'").

There can be little doubt that Justice Powell intended to control or, at the very least, narrow the holding in *Branzburg*. Explaining his necessary fifth vote several years later, Justice Powell wrote:

> The concurring opinion in *Branzburg v. Hayes* . . . noted . . . that in considering a motion to quash a subpoena directed to a newsman, the court should balance the competing values of a free press and the societal interest in detecting and prosecuting crime. . . . Rather than advocating the creation of a special procedural exception for the press, it approved

> recognition of First Amendment concerns within the applicable procedure.

Zurcher v. Stanford Daily, 436 U.S. 547, 570 n.3 (1978) (Powell, J., concurring).

Thus, even in spite of *Branzburg*'s result, perhaps the most plausible reading of that decision is that this Court held the First Amendment provides newsgatherers and publishers with some degree of constitutional protection against the compelled disclosure of their confidential source, even when subpoenaed by a grand jury. *See Branzburg*, 408 U.S. at 709-10 (Powell, J. concurring); *id.* at 712-13, 721-22 (Douglas, J., dissenting); *id.* at 736-38, 743 (Stewart, Brennan, Marshall, JJ., dissenting). Or perhaps, as Justice Stewart commented in a law journal article, *Branzburg* was a stalemate in which this "Court rejected the [reporters'] claims . . . by a vote of four and a half to four and a half." Potter Stewart, *Or of the Press*, 26 HASTINGS L.J. 631, 635 (1975).

In either case, it goes almost without saying that the "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and the current arbitrary patchwork of varied First Amendment protections for confidential news sources surely does not adequately secure the freedoms of speech and of the press. Indeed, both Petitioner Judith Miller and Respondent Special Counsel Patrick Fitzgerald know well that newsgatherers enjoy widely differing constitutional protections for their confidential sources depending solely upon the jurisdiction in which their discovery is sought. *Compare In re Grand Jury Subpoena (Miller)*, 397 F.3d at 970 (upholding a contempt citation against Ms. Miller because "the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence

promised by the reporter to any source"); *with New York Times v. Gonzales*, No. 04 Civ. 7677 (RWS), 2005 U.S. Dist. LEXIS 2642 (S.D.N.Y. Feb. 24, 2005) (recognizing a reporter's privilege under the First Amendment and common law that protects Ms. Miller's confidential sources and telephone records). Such arbitrary First Amendment protection is not constitutionally acceptable, and this Court should grant review to resolve these conflicts.

B. The Foundations Underlying *Branzburg* Have Shifted and a Consensus Among the States Now Favors Protection for Confidential News Sources

Although the federal circuit courts are much conflicted as to whether and when newsgatherers enjoy a constitutional privilege protecting their confidential sources from compelled disclosure in legal proceedings, the states are unanimous in embracing some sort of reporter's privilege, with the sole exception of Wyoming, which has not considered the issue. *See Miller v. United States*, No. 04-1507, Pet. for Writ of Cert., at 23-24, n.21 & 22 (collecting state statutes and cases establishing a reporter's privilege). In fact, the concurring opinion of Judge Tatel below recognized "that forty-nine states plus the District of Columbia offer at least qualified protection to reporters' sources." *In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 993 (Tatel, J., concurring).

As Judge Tatel observed, "Denial of the privilege, then, would . . . buck the clear policy of virtually all the states," and, "[i]nsofar as *Branzburg* relied on the 'great weight of authority' to discern the First Amendment's meaning, the shift in favor of the privilege since that time — from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection — could provide a basis for rethinking *Branzburg*." *Id.* at 993, 994 (Tatel, J., concurring).

Indeed, earlier this term, this Court did just that in an Eighth Amendment case, reconsidering and reinterpreting the constitutional prohibition against "cruel and unusual punishment" with far less consensus among the states. *See Roper v. Simmons*, 125 S. Ct. 1183, 1192 (March 1, 2005) (reinterpreting the Eighth Amendment to bar imposing capital punishment on juveniles after finding that 30 states prohibit the juvenile death penalty); *see also Atkins v. Virginia* 536 U.S. 304, 306-07 (2002) (also reinterpreting the Eighth Amendment to bar the execution of the mentally retarded after finding that 30 states had rejected the practice).

Even if it were true in 1972 "that the great weight of authority [wa]s that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation," *Branzburg*, 408 U.S. at 685, the same is no longer true in 2005. It is quite the opposite. In more than three decades since this Court decided *Branzburg*, it has become the all but unanimous position of the states that newsgatherers should enjoy protection for their confidential sources against compelled disclosure in legal proceedings. This national consensus among the states developed at the same time as this Court granted greater constitutional protection to speech of all kinds, requiring that even generally-applicable laws survive heightened scrutiny when they burden asserted First Amendment interests. *See, e.g., Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1994). Moreover, over the same time period, this Court has been extraordinarily careful to ensure that government does not interfere with the gathering, communication, and dissemination of truthful speech and information, such as the very reporting and publishing targeted by the subpoenas in these cases. *See generally Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978).

This national consensus among the states along with the steady and consistent development and extension of robust

First Amendment protections leads to a single conclusion — that newsgatherers are entitled to at least some constitutional protection for their confidential sources. This Court should grant review in these cases to reconsider whether the First Amendment provides that protection consistent with the consensus that has emerged from the states and the advances in this Court's First Amendment jurisprudence.

II. REVIEW IS WARRANTED TO RECONSIDER THE SUBMISSION AND CONSIDERATION OF *EX PARTE* EVIDENCE AGAINST THE REPORTERS

Perhaps the most surprising and objectionable part of the decision below was the court's willingness to uphold the contempt citations against and possible imprisonment of the Petitioners based upon evidence neither they nor their counsel were allowed to examine or afforded the opportunity to rebut. In fact, all three judges below ruled "that if [the reporter's] privilege applies here, it has been overcome," and then explained that "the reasons [were] set forth in the separate opinion of Judge Tatel." *In re Grand Jury Subpoena* (*Miller*), 397 F.3d at 973. But while "the reasons" may have, in fact, been "set forth" in Judge Tatel's concurring opinion, *id.*, any reader — including Petitioners Judith Miller, Matthew Cooper, Time Inc., and their counsel — other than the judges and the Special Counsel would never know because those findings were redacted — all eight pages of them. *See id.* at 1002 (Tatel, J., concurring). Thus, Petitioners not only had to take the word of the court below that the judges did "ensure that the special counsel ha[d] met his burden demonstrating that information is both critical and unobtainable from any other source," but the Petitioners also never had the opportunity to review or rebut the evidence submitted and considered against them. *Id.* Such an *ex parte* procedure not only offends constitutional common sense, but

also fails to meet the most minimal requirements of due process regardless of the countervailing interests at stake.

Notably, a plurality of this Court ruled just last term in *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004), that even alleged enemy combatants are entitled to greater due process with regard to knowledge of and challenge to the adverse evidence than Petitioners received in both the court below and the district court. Specifically, this Court concluded in *Hamdi*, that an enemy combatant was due, at a minimum, "a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker," and that "[a]ny process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short." *Id.* at 2648. Indeed, other courts have held that an accused's opportunity to review, challenge, and rebut evidence introduced to "deprive" him of "life, liberty, or property" is fundamental to any minimal due process standard, even when that evidence is classified based on national security concerns. *See, e.g.*, *United States v. Moussaoui*, 382 F.3d 453, 475 (4th Cir. 2004), *cert. denied*, 125 S. Ct. 1670 (March 21, 2005); *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 468 (D.D.C. Jan. 31, 2005). As a result, in cases like the criminal prosecution of Zacarias Moussaoui, the government has been required to offer either the defendant or his counsel who have proper security clearance the opportunity to examine the evidence submitted against him.

The interests on the side of secrecy in these cases do not come close to the compelling and certain risks raised by the evidence in the enemy combatant and terrorism-related cases that this Court and others have held to be subject to an accused's review, challenge, and rebuttal. Moreover, reports of the Special Counsel's investigation have gone so far as to suggest that it is possible — if not likely — that the disclosure of Valerie Plame's classified identity as a CIA

operative did not violate any criminal laws, meaning the importance of the investigation is comparatively low. *See, e.g.*, Susan Schmidt, *The When and How of Leak Being Probed: Timing of Disclosure of CIA Employee's Name a Factor in Deciding if Law Was Broken*, WASH. POST, Nov. 26, 2004, at A6 (noting "[t]o constitute a violation of the Intelligence Identities Protection Act, a disclosure by a government official must have been deliberate, the person doing it must have known that the CIA officer was a covert agent, and he or she must have known that 'the United States is taking affirmative measures to conceal such covert agent's intelligence relationship to the United States,'" and explaining that "[i]f White House aides directed reporters to information that had already been published by [columnist Robert] Novak, they may not have disclosed classified information").

Given these circumstances, surely the Petitioners were due at least the minimal amount of process that this Court and others have granted to not only American citizens but even foreign enemy combatants. As a result, this Court should grant review in these cases in order to remedy the obvious and egregious constitutional due process errors committed by the court below.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions for writs of certiorari.

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May 18, 2005

Nos. 04-1507 & 04-1508

Supreme Court, U.S.
FILED
MAY 27 2005
CLERK

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INTEREST OF *AMICI CURIAE*

The thirty-four *Amici* States and the District of Columbia, each of which appears in this Court through its respective

Attorney General, recognize some form of a "reporter's privilege" through either legislation or judicial decision. The privilege protects journalists from compelled disclosure of information obtained from confidential sources. In applying the privilege, most States employ a balancing test that weighs the public interest in protecting reporters' newsgathering and the free flow of information against the relevance of the information, the availability of alternative sources and the public interest in compelling disclosure.

These "shield laws," like those of the other fifteen states that have them, share a common purpose: to assure that the public enjoys a free flow of information and that journalists who gather and report the news to the public can do so in a free and unfettered atmosphere. The shield laws also rest on the uniform determination by the States that, in most cases, compelling newsgatherers to disclose confidential information is contrary to the public interest.

As Judge Tatel noted in his concurring opinion in the court of appeals, there has been a "shift in favor of the [reporter's] privilege" among the States since this Court last addressed the issue in *Branzburg v. Hayes*, 408 U.S. 665 (1972), "from seventeen states with statutory privileges then to thirty-one plus D.C. today, with another eighteen providing common law protection." Pet. App. 59a.[1] The statutes and judicial decisions of the fifty jurisdictions that fueled this "dramatic growth in support for the reporter privilege," *id.* 61a, are collected in the Miller Petition (No. 04-1507) at 23 nn.21-22.

The decision below – in which the court of appeals declined to fashion *any* corresponding federal reporter's privilege – conflicts with the recognition of such a privilege by virtually every State and the District of Columbia. A federal policy that allows journalists to be imprisoned for engaging in the same conduct that these State privileges encourage and

[1] The fiftieth State, Wyoming, has yet to address the issue.

protect "buck[s] the clear policy of virtually all states," Pet. App. 58a (Tatel, J., concurring), and undermines both the purpose of the shield laws, and the policy determinations of the State courts and legislatures that adopted them. *Cf. Jaffee v. Redmond*, 518 U.S. 1, 12-13 (1996).[2]

The *Amici* States also have a vital interest in this issue independent of protecting the integrity of their shield laws. Uncertainty and confusion – exemplified by the split in the federal courts of appeals and by the fractured panel opinions below – have marked this area of the law in the three decades that have passed since this Court decided *Branzburg* and the Congress enacted Rule 501 of the Federal Rules of Evidence. This increasing conflict has undercut the State shield laws just as much as the absence of a federal privilege.

REASONS FOR GRANTING THE PETITIONS

I. THE LACK OF A FEDERAL REPORTER'S PRIVILEGE UNDERMINES THE LEGISLATIVE AND JUDICIAL DETERMINATIONS OF FORTY-NINE STATES AND THE DISTRICT OF COLUMBIA

Forty-nine States and the District of Columbia recognize some form of reporter's privilege.[3] The scope of the privileges varies, but all rest on a legislative or judicial determination that an informed citizenry and the preservation of news information sources are of vital importance to a free

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[2] *Amici* take no position on whether such a privilege would cover the communications at issue in this case, or on the Fifth Amendment questions presented in the Petitions for Certiorari.

[3] Some have done so by statute and others by judicial decision; some privileges are absolute, but most are qualified; most jurisdictions use the "privilege" label; others, such as Maine, employ the case-by-case balancing test approach outlined in Justice Powell's concurring opinion in *Branzburg*, 408 U.S. at 709-10. *See In re Letellier*, 578 A.2d 722, 725-27 (Me. 1990).

society. Without such a privilege, reporters in those States would find their newsgathering abilities compromised, and citizens would find themselves far less able to make informed political, social and economic choices.

The determinations made by Nebraska and North Carolina typify those of the other forty-eight jurisdictions. As the Nebraska Legislature found, a shield law vindicates the State's policy of "insur[ing] the free flow of news and other information to the public," and guaranteeing that "those who gather, write, or edit information for the public or disseminate information to the public . . . perform these vital functions only in a free and unfettered atmosphere." Neb. Rev. Stat. Ann. § 20-144. Moreover, "compelling such persons to disclose a source of information or disclose unpublished information is contrary to the public interest and inhibits the free flow of information to the public." *Id.*

In North Carolina, the reporter's privilege likewise is intended

> to protect the free flow of information and avoid the impediment that occurs when reporters are subjected to in-court examination of their newsgathering activities. . . .
>
> . . . The compelled production of a reporter's resource materials and testimony can constitute a significant intrusion into the newsgathering and editorial processes and may substantially undercut the public policy favoring the free flow of information to the public that is the foundation for the reporter's privilege.

Higgins v. Young, No. 97CVD563, 2001 WL 1692379, at *2 (N.C. Super. Ct. Aug. 8, 2001) (unpublished opinion) (citing N.C. Gen. Stat. § 8-53.11(c)).

The lack of a corresponding federal reporter's privilege undermines these vital State interests. Without it,

> the degree to which confidential sources could be protected would be rendered uncertain, thereby lessening the likelihood that such sources will cooperate and undercutting the very benefit to the public that . . . many . . . states . . . sought to bestow through [their] shield law[s].

New York Times Co. v. Gonzales, No. 04 Civ. 7677(RWS), 2005 WL 427911, at *41 (S.D.N.Y. Feb. 24, 2005, as amended Mar. 2, 2005).

To quote Judge Tatel, continued denial of a federal reporter's privilege would "'frustrate the purposes of the state legislation' by exposing confidences protected under state law to discovery in federal courts." Pet. App. 57a (quoting *Jaffee*, 518 U.S. at 13).

II. CHANGES IN THE STATE LAW LANDSCAPE IN THE THIRTY YEARS SINCE *BRANZBURG* AND THE ENACTMENT OF RULE 501, AND THE DISARRAY IN THE CIRCUITS, MAKE THE ISSUE RIPE FOR DECISION BY THIS COURT

Rule 501 of the Federal Rules of Evidence "did not freeze the law governing the privileges of witnesses in federal trials," but instead directed the "federal courts to 'continue the evolutionary development of testimonial privileges.'" *Jaffee*, 518 U.S. at 8-9 (quoting *Trammel v. United States*, 445 U.S. 40, 47 (1980)). The federal courts are to do so "by interpreting 'common law principles . . . in the light of reason and experience.'" *Id.* at 8 (quoting Rule 501) (alteration in original). In deciding whether that "evolutionary development" has reached the point where "reason and experience" make it appropriate to define a new testimonial privilege,

State precedent and the existence of a consensus among the States are of particular importance. *Id.* at 12-13.

As this Court observed in *Jaffee*, the "policy decisions of the States bear on the question whether federal courts should recognize a new privilege." *Id.* (citing *Trammel*, 445 U.S. at 48-50; *United States v. Gillock*, 445 U.S. 360, 368 n.8 (1980)). Because State legislatures "are fully aware of the need to protect the integrity of the factfinding functions of their courts, the existence of a consensus among the States indicates that 'reason and experience' support recognition of the privilege." *Jaffee*, 518 U.S. at 13. The case for the privilege is even stronger where, as here, "the information sought is protected by a state privilege." *Pearson v. Miller*, 211 F.3d 57, 67 (3d Cir. 2000).[4]

Here, as in *Jaffee*, a "consistent body" of policy determinations by State legislatures reflects both "reason" and "experience." *Jaffee*, 518 U.S. at 13 (citing *Funk v. United States*, 290 U.S. 371, 376-81 (1933)). And, again as in *Jaffee*, the history of the reporter's privilege shows that in the years since *Branzburg* and the enactment of Rule 501, the States' lawmakers moved quickly to adopt the reporter's privilege, as they "rapidly recognized the wisdom" of such a privilege. 518 U.S. at 14.

To be sure, the States' shield laws and judicially crafted reporter's privileges vary in scope and exceptions. But all State *Amici* agree that some form of a reporter's privilege grounded in federal common law is appropriate, and the majority of States have adopted a balancing test approach akin to that suggested by Judge Tatel. *See* Pet. App. 62a-72a. Because "confidential sources are essential to the workings of the press—a practical reality that virtually all states and the

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[4] If this matter had involved a District of Columbia, instead of a federal, grand jury, the District of Columbia shield law (D.C. Code Ann. §§ 16-4701-16-4704) would have protected Petitioners.

federal government now acknowledge," the *Amici* States, like Judge Tatel, believe that "'reason and experience' compel recognition of a privilege for reporters' sources." Pet. App. 84a-85a.[5]

The consensus among the States on the reporter's privilege issue is as universal as the federal courts of appeals decisions on the subject are inconsistent, uncertain and irreconcilable. For example, the Eleventh Circuit holds that the privilege exists in both criminal and civil cases,[6] the Ninth Circuit applies the privilege in the civil[7] and criminal[8] trial contexts, but not in the grand jury context,[9] and the Seventh Circuit concludes[10] that there is no privilege at all.[11] These vagaries in the application of the federal privilege corrode the protection the States have conferred upon their citizens and newsgatherers, as an "'uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.'" *Jaffee*, 518 U.S. at 18 (quoting *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981)).

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[5] *Amici* take no position at the Petition Stage on the precise form and scope of such a privilege.

[6] *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

[7] *Shoen v. Shoen*, 5 F.3d 1289, 1295-96 (9th Cir. 1993).

[8] *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975).

[9] *Scarce v. United States (In re Grand Jury Proceedings)*, 5 F.3d 397, 401-02 (9th Cir. 1993).

[10] *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003).

[11] These divergent approaches are canvassed at length in the Miller Petition (No. 04-1507) at 13-19 and the Cooper/Time Petition (No. 04-1508) at 14-16, 22-23.

CONCLUSION

The present confusion and lack of clarity as to the existence and the scope of a federal reporter's privilege, three decades after *Branzburg* and Rule 501, disserve the public, sources and reporters in every State. A decision in this case by this Court, definitively resolving the question of a reporter's privilege, "will provide critical guidance in similar situations in the future." Pet. App. 53a (Tatel, J., concurring). Accordingly, "[f]or the sake of reporters and sources whom such litigation may ensnare," this Court "should take this opportunity to clarify the rules governing their relationship," *id.*, by granting the Petitions.

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May 27, 2005

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